

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`





CX
ARD
KWX3

STANFORD LAW LIBRARY

A TREATISE

ON THE

CONSTRUCTION OF THE STATUTES

13 ELIZ. C. 5, AND 27 ELIZ. C. 4,

RELATING TO

VOLUNTARY AND FRAUDULENT

CONVEYANCES,

AND ON THE NATURE AND FORCE OF DIFFERENT CONSIDERATIONS
TO SUPPORT DEEDS AND OTHER LEGAL INSTRUMENTS
IN THE COURTS OF LAW AND EQUITY,

BY WILLIAM ROBERTS,

OF LINCOLN'S INN,

Author of a Treatise on the Statute of Frauds, and a Treatise on the Law of Wills and Codicils.

THIRD AMERICAN,

FROM THE LAST ENGLISH EDITION,

With additional Notes, and references to American and later English Decisions.

BURLINGTON:

CHAUNCEY GOODRICH.

1845.

Entered according to act of Congress in the year 1845, by
CHAUNCEY GOODRICH,
in the Clerk's office of the District Court, for the district of Vermont.

TO

THE RIGHT HONORABLE

JOHN LORD ELDON,

BARON OF ELDON,

IN THE COUNTY PALATINE OF DURHAM,

LORD CHIEF JUSTICE OF THE COURT OF COMMON PLEAS, &c. &c. &c.

THIS TREATISE

IS,

WITH HIS LORDSHIP'S PERMISSION,

AND WITH SENTIMENTS OF RESPECT AND ADMIRATION,

HUMBLY DEDICATED.

A TABLE

OF THE

CONTENTS.

CHAP. I.

		Page.
Sect. I.	PRELIMINARY Observations.	1
	SETTLEMENTS.	17
	Debts precedent and subsequent.	19
2.	*Intent to deceive.*	30
	Notice to the purchaser.	39
3.	*Persons benefitted by the statutes.*	46
4.	*Voluntary Conveyances, how far fraudulent.*	61
	Nature and effect of the valuable consideration.	67
6.	*Origin of uses.*	84
	Considerations to raise uses.	85
	——— *support promises.*	93

CHAP. II.

Sect. 1.	Consideration of marriage.	101
2.	*Settlements partially valid.*	112
3.	*Considerations, and relief in equity.*	116
4.	*Extent of the marriage consideration.*	123
5.	*Accessory consideration where parents join in the settlement.*	139
6.	*Of the reciprocity of interest necessary to ground the consideration.*	153

Page.

Sect. 7. *Collateral limitations.* 162
Interest of the husband under a settlement. 171
8. *Limitations to the heirs of the grantor.* 175

CHAP. III.

Sect. 1. Settlements after marriage. 187
Construction more favorable to purchasers than to creditors. 189
Settlements after marriage void. 193
2. *Assurances upon Record.* 205
3. *Settlements after marriage void.* 213
4. *Settlements after marriage grounded on prior agreements.* 218
5. *Same subject.* 236
6. ——————— *must be conformable to such prior agreements.* 245
7. *Settlements after marriage founded on fresh agreements.* 249
8. *Settlements after marriage founded on new considerations.* 253
9. *Settlements supported by contracts between husband and wife.* 262
10. *Settlements after marriage of the wife's trust property.* 279
11. *Of assignments of the wife's trust property.* 291
12. *Of the husband's power of disposition over* terms of years *held in trust for married women.* 299
13. *Settlements after marriage grounded on voluntary separation.* 316
14. *Settlements made previous to a second, upon children of a first marriage.* 348

CHAP. IV.

		Page.
Sect. 1.	Operation of the statutes upon simple conveyances.	366
	Purchaser, how qualified to take advantage of statute 27 Eliz.	368
2.	*Construction of statute 13th and 27th Eliz. as to conveyances merely voluntary.*	395
	Voluntary gifts of money.	420
	Incapacity of the donor.	425
	——— *how far it repels the presumption of fraud.*	426
	Conveyances for payment of debts.	430
3.	*Charitable donations.*	436
4.	Donatio causa mortis.	442
	Conveyance in expectation of death.	444
5.	*The consideration of natural love.*	448
	Debts founded in maleficio.	456
	——— *arising collaterally.*	459
6.	*Purchasers in the names of third persons.*	463
	Conveyance by the husband of an executrix.	467
	Conveyances by persons entitled de jure alieno.	469
7.	*Voluntary executions of powers of appointment.*	473
8.	——— *bonds.*	478
9.	*Judgments by confession.*	489
10.	*Considerations arising* ex post facto.	495

CHAP. V.

Sect. 1.	*Antipathy to fraud characteristic of the common law.*	520
	Remedies against fraud at the common law.	522
2.	——— *in equity.*	526
3.	*All statutes against fraud equitably and beneficially construed.*	542
	Remedy, how advanced by the statutes.	544

Page.

Sect. 3. *Badges of fraud.* 546
——— *possession after conveyance.* 549
——— *retained after execution.* 573
——— *conveyance pending an action.* 575
——— *to avoid forfeiture.* 583
4. *Fraud not helped by circuity.* 587
5. *How the statutes work to the benefit of the party protected.* 591
6. *Lands fraudulently aliened will descend as assets.* 597

CHAP. VI.

Sect. 1. 2. 3. *Fraudulent powers of Revocation.* 611

CHAP. VII.

Sect. 1. *Voluntary deeds, how far binding on the party and his representatives.* 641

PREFACE.

THE want of opportunities of communication, and of the advantage of learned assistance, which the urgency of circumstances has precluded the Writer of the following pages from enjoying, were good reasons to deter him from his undertaking, but are no excuse for his failure in the execution. He must not, therefore, hope to shelter himself under such an apology. He may perhaps, however, incline his Readers to deal more favorably with his errors by directing their thoughts to the natural difficulty of the subject, and the floating state of the opinions and judgments respecting it. His choice has not afforded him the pleasure of expatiation in a province decorated and systemized by learning and ability. It is new and adventurous, and points to a path of enquiry, in which there are few guides to direct diligence, and but little precision to assure the judgment. It is upon the difficulty, therefore, of his subject, that the writer founds his claim to the benignity of the profession. He has felt the impossibility of extracting pure science and perfect system from the opinions of great men pronounced at distant periods, under the influence of the different modes of thinking, which social and political changes produce, and obscured by the very imperfect manner in which it has been often their lot to be reported. It has been his endeavor, therefore, first, to vindicate to himself the right of free examination, by displaying the contradictoriness of great

opinions, and then, from the reasonings and data which those opinions furnish compared with the general maxims of our Common Law, to draw out a result which might connect in correspondence and consistency the greater and more venerable part of our legal authorities.

While we cannot but lament the propensity of great talents to lead rather than to follow, and the impulse of compassion for individual hardship have in time past produced some inconsistency and derangement in the system of our laws, it is a pleasure to observe in the present disposition of our Judges, no less exposed to the irregular influences of feeling and genius, a manly obsequiousness to fundamental maxims, and a resolution to ensure the permanence by maintaining the consistency of legal principles, and placing them above the reach of transitory fashions and opinions.

The Reader will not be detained by any analysis of the plan of the following sheets, further than a mere table of contents, as a running title has been added to point out the general matter of each page; but it is felt necessary to direct attention to the note in Page 341, where the case of *Marshall* v. *Rutton*, is mentioned as at that moment depending before the twelve Judges, a circumstance of which the Writer had only been apprized since the preceding sheet has been sent to press. Within these few days he has been informed that the Judges have pronounced their unanimous opinion by the mouth of the Chief Justice of the King's Bench. Mr. Durnford has been so obliging as to favor the writer with the manuscript of his intended report of the judgment.—The perusal, which could but be tremblingly wished for after the discussion which the subject had undergone in the thirteenth Section of the third Chapter of this Treatise, affording him a gratification as great as his respect for those high characters who proved by their decision that his humble thoughts were not erroneous.

An opportunity here presents itself of introducing the substance of a case just determined in the Court of K. B. and which is il-

lustrative and confirmatory of some of the most important doctrines contained in this volume. Vid. 8 T. R. 521. *Nunn* and *Ladbrooke*, assignees of W. Wilsmore, against *Mary Wilsmore*, executrix of T. Wilsmore.

W. Wilsmore, being indebted to T. Wilsmore, the defendant's deceased husband, in £300 and to S. B. in £130 made a bill of sale of his effects to S. B. dated 20th July 1792, as a security for those debts. The effects thus assigned were thereupon sold by S. B. who retained his own debt out of the produce; and in November 1792 paid over the remainder (being the money for which the action was brought) to T. Wilsmore, on account of his debt. T. Wilsmore had received a fortune of about £1,800 with the defendant his wife, (his own property having been about £200 only); but being a dissipated man had contracted a great number of debts. In September, 1793, T. Wilsmore and the defendant, his wife, agreed to separate, which agreement was, in the month of October following, carried into execution by an indenture, whereby, after reciting that the defendant had been ill treated by her husband, and that, in order to put an end to their differences, and to make some provision and maintenance for her, T. Wilsmore had proposed that on being paid the sum of £200 for his own separate use, he would quit the farm at P. and transfer his farming stock, &c. and his household furniture, &c. and all his right and interest in the lease of his farm, and the effects thereon, and all debts due to him, unto H. and T., and that the husband and wife had besought H. to advance to T. Wilsmore the said sum of £200 which he had consented to do upon having a security as therein mentioned, the said T. Wilsmore, in consideration of the agreement and the £200 advanced by H. assigned all his property and effects, according to the agreement, to H. and T. upon trust, that H. should reimburse himself the said £200 and upon further trust, that the said trustees out of the produce of the farm, or by sale of the property and effects assigned them, should discharge all or such part or parts of the

debts owing by the said T. Wilsmore, and which he had given in an account of, as they in their discretion should think proper; and upon further trust that they should pay and apply the overplus to Mary Wilsmore for her separate use and benefit. In pursuance of this deed, T. Wilsmore left the farm, and died in the year 1794 intestate. The trustees entered upon their trust, sold the effects, and paid the expenses of sale, &c. and no such account, as mentioned in the deed, having been given by the deceased, they advertised for all his creditors to meet, that his debts might be discharged, and paid all such creditors as sent in their demands 20*s*. in the pound. After which there remained a balance of £329 19*s*. 1*d*. exclusive of the value of the lease, and certain articles of furniture and stock to the amount of £111 which had been bought in by one of the trustees at the auction, though not paid for, and which remained in defendant's possession on the farm at the time of the husband's death, and also at the commencement of the action. The lease, which was of the value of £500 had been granted to the deceased T. Wilsmore, jointly with his father, one of the trustees, and it contained the usual covenant and proviso against assignment. The defendant's husband, T. Wilsmore, stocked and carried on the farm till the deed of separation. The defendant resided on the farm constantly from the time of the separation, and received the benefit of the produce thereof from time to time from the trustees. On the 22d of November, 1793, a commission of bankrupt issued against W. Wilsmore, founded on an act of bankruptcy committed previously to the bill of sale to T. Wilsmore and S. B.; and the assignees brought an act of assumpsit for money had and received by the defendant's testator to their use upon the following grounds, viz. that by the relation of the commission, all the intermediate acts of the bankrupt in diminution of his estate since the act of bankruptcy were avoided, and consequently the particular assignees under the above mentioned bill of sale became accountable for the value of the property conveyed by it to the general

creditors; and that while under such liability T. Wilsmore made the assignment by indenture above mentioned upon the occasion of the said separation between him and the defendant his wife. The defendant, as being in possession under such assignment to her trustees, was sued by the plaintiffs as executrix *de son tort* agreeably to the rule discussed in page 593 *et seq.* of this volume; to which, besides other pleas, she pleaded *plene administravit.* The case was tried by the late Mr. Justice Buller, at the Lent assizes for Essex, and a verdict was taken for the plaintiffs for the amount of the money paid over by S. B. to T. Wilsmore deceased, subject to the opinion of the Court upon the case as stated above.

Two points were made by the bench.

1st, Whether the deed whereby the effects of T. Wilsmore were conveyed for the purposes therein mentioned, were actually fraudulent.

2. Whether it was fraudulent by being *voluntary*, for if it were voluntary, it was said, the law would *infer* fraud. *(a)*

That it was not actually fraudulent the Chief Justice thought perfectly clear. Consider, said his Lordship, what was the condition of the parties; the husband and wife were living together on bad terms: the former was squandering away the property, and ill treating the wife; and in order to prevent his ill using her in future, and to prevent her instituting a suit in the spiritual court, *(b)* and to put an end to all differences, and in consideration of £200 *advanced* by one of the trustees, this deed was executed. His Lordship observed, that it had been said that it was merely a loan of the £200 by the trustee; but he did not see why that was not a consideration to support the deed. In deciding questions of this sort, continued his Lordship, the courts have always disavowed enquiring whether the consideration were equivalent. They will

(a) Vid. this Treatise, page 395. *et seq.*

(b) Vid. this Treatise, page 343.

not weigh it in very nice scales, if it be a fair and honest transaction. Then what was done for this *valuable* consideration? instead of sending the wife into the Spiritual Court for alimony, (c) a provision was first made for the husband himself; he was to receive £200 the amount of his own property; then provision was to be made for all his just debts; and lastly, the residue was to be a provision for his wife, so ill used, and so *deprived of an appeal* to the laws of her country for alimony. I admit, said his Lordship, that *if this were a voluntary deed, the law says it is fraudulent;* (d) but I consider this deed as having been made for valuable consideration and not voluntary. I read over those parts of the deed not set forth, to see whether or not the trustees had *indemnified the husband against the future debts of the wife;* (e) and though the deed contains no covenant of that kind, much was *to be done by the trustees*; (f) they were to enter upon the farm, and to be at the expense of carrying it on; very small considerations have, sometimes, been holden sufficient to give validity to a deed; where, in framing family settlements, limitations are made to the distant branches of the family, such remainders are not considered as voluntary, if the object of the parties making the settlement were fair and honest. (g) But here there was an immediate consideration; independently of the provision of the husband, he was relieved from the consequences of a suit in the Spiritual Court. Therefore I am of opinion, concluded his Lordship, that this deed was not only a fair and conscientious deed, but also, there was a good consideration for it, which delivers it from all obligations by those who now wish to impeach it, and consequently that the plaintiffs cannot recover in this action. Of which opinion were the rest of the Judges, and upon similar reasons.

(c) Id. page 343.
(d) Id. sect. 2. ch. 4.
(e) Id. page 347.
(f) Id. 323.
(g) Vid. this Treat. c. 2. sec. 4, 5, 6, 7, 8.

PREFACE.

The Writer has adopted this case (which has only come to his knowledge since the whole of his Book has been printed) by way of introduction, as the opinion of the Lord Chief Justice embraces a very considerable number of the points, which had been attempted to be discussed in the following sheets.

One word only remains to be added here. The Writer ventures to announce his intention of prosecuting his investigations through all the branches of his subject, which have yet escaped the zealous researches of methodical industry, among which he proposes to include an arrangement of the decisions upon the law of *fraudulent devises*, and the *great statute of frauds and perjuries*. Whether or not he shall persevere in what he has with great timidity begun, must depend upon the credit his present Work may find with the profession.

Lincoln's Inn, Easter Vacation, 1800.

A TREATISE

ON

FRAUDULENT CONVEYANCES,

&c. &c.

CHAPTER I.

SECTION I.

It was an observation of Lord Mansfield (1), that the principles and rules of the common law, as now universally known and understood, are so strong against Fraud in every shape, that the common law was calculated to attain every end proposed by the statutes ‖of 13 El. c. 5, *(a)*, and 27 El. c. 4.‖ *(b)*.* 2 3 And in *Pauncefoot's* case, cited in *Twyne's* case, determined

(*a*) 13 Eliz. c. 5. (2) For the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well as of lands and tenements as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore: which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, not only to the let or hinderance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued:

2. Be it therefore declared, ordained and enacted, by the authority of this present parliament, That all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution, at any time had or made sithence the beginning of the queen's majesty's reign that now is, or at any time hereafter to be had or made, to or

(1) Cowper, 434. (2) Made perpetual 29 Eliz. c. 5.

* Revised Stat. Vt. c. 95. §19-20.

in the exchequer chamber, Michaelmas 35 & 36 Eliz., ||where Pauncefoot, being indicted for recusancy for not coming to

for any intent or purpose before declared or expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, by such guileful, covinous or fraudulent devices and practices, as is aforesaid, are, shall or might be in any wise disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate, and of none effect; any pretence, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

3. And be it further enacted by the authority aforesaid, That all and every the parties to such feigned, covinous, or fraudulent feoffinent, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, and other things before expressed, and being privy and knowing of the same, or any of them; which at any time after the tenth of June next coming shall wittingly and willingly put in ure, avow, maintain, justify or defend the same, or any of them, as true, simple, and done, had or made *bona fide* and upon good firm consideration; or shall alien or assign any lands, tenements, goods, leases, or other things before-mentioned, to him or them conveyed as is aforesaid, or any part thereof: shall incur the penalty and forfeiture of one year's value of the said lands, tenements, and hereditaments, leases, rents, commons, or other profits, of or out of the same; and the whole value of the said goods and chattels; and also so much money as are or shall be contained in any such covinous and feigned bond; the one moiety whereof to be to the queen's majesty, her heirs and successors, and the other moiety to the party or parties grieved by such feigned and fraudulent feoffinent, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, leases, rents, commons, profits, charges and other things aforesaid, to be recovered in any of the queen's courts of record by action of debt, bill, plaint, or information, wherein no essoin, protection or wager of law shall be admitted for the defendant or defendants; and also, being thereof lawfully convicted, shall suffer imprisonment for one half year, without bail or mainprize.

4. Provided always, and be it further enacted by the authority aforesaid, That whereas sundry common recoveries of lands, tenements and hereditaments, have heretofore been had, and hereafter may be had, against tenant in tail, or other tenant of the freehold, the reversion or remainder, or the right of reversion or remainder, then being in any other person or persons; that every such common recovery heretofore had, and hereafter to be had, of any lands, tenements or hereditaments, shall, as touching such person and persons which then had any remainder or reversion, or right of remainder or reversion, and against the heirs of every of them, stand, remain and be of such like force and effect, and of none other, as the same should have been if this act had never been made.

divine service, and intending to fly beyond|| sea, in order to defeat the Queen of what might accrue to her for his recusancy or

5. Provided always, and it be further enacted by the authority aforesaid, That this act, or any thing therein contained, shall not extend to make void any estate or conveyance, by reason whereof any person or persons shall use any voucher in any writ of *formedon*, now depending or hereafter to be depending, but that all and every such vouchers in any writ of *formedon* shall stand and be in like force and effect, as if this act had never been made; any thing before in this act contained to the contrary notwithstanding.

6. Provided also, and it be enacted by the authority aforesaid, That this act, or any thing therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which estate or interest is or shall be upon good consideration and *bona fide* lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud or collusion as is aforesaid; any thing before mentioned to the contrary hereof notwithstanding.

(*b*) 27 Eliz. c. 4.(1) Forasmuch as not only the queen's most excellent majesty, but also divers of her highness' good and loving subjects, and bodies politic and corporate, after conveyances obtained or to be obtained, and purchases made or to be made, of lands, tenements, leases, estates and hereditaments, for money or other good consideration, may have, incur, and receive great loss and prejudice by reason of fraudulent and covinous conveyances, estates, gifts, grants, charges and limitations of uses heretofore made or hereafter to be made, of, in or out of lands, tenements or hereditaments so purchased or to be purchased; which said gifts, grants, charges, estates, uses and conveyances were or hereafter shall be meant and intended by the parties that so make the same to be fraudulent and covinous, of purpose and intent to deceive such as have purchased or shall purchase the same; or else by the secret intent of the parties the same be to their own proper use, and at their free disposition, colored nevertheless by a fained countenance and show of words and sentences, as though the same were made *bona fide*, for good causes, and upon just and lawful considerations.

2. For remedy of which inconveniences, and for the avoiding of such fraudulent, fained and covinous conveyances, gifts, grants, charges, uses and estates, and for the maintenance of upright and just dealing in the purchasing of lands, tenements and hereditaments; be it ordained and enacted by the authority of this present parliament, That all and every conveyance, grant, charge, lease, estate, incumbrance and limitation of use or uses, of, in or out of any lands, tenements or other hereditaments whatsoever, had or made any time heretofore sithence the beginning of the queen's majesty's

(1) Made perpetual by 30 Eliz. c. 18. s. 3.

flight, made ||a feigned gift of all his leases and goods, some conceived, as is there observed, that the common law, which

reign that now is, or at any time hereafter to be had or made, for the intent and of purpose to defraud and deceive such person or persons, bodies politic or corporate, as have purchased or shall afterwards purchase in fee-simple, fee-tail, for life, lives or years, the same lands, tenements and hereditaments, or any part or parcel thereof, so formerly conveyed, granted, leased, charged, incumbred or limited in use, or to defraud and deceive such as have or shall purchase any rent, profit or commodity in or out of the same, or any part thereof, shall be deemed and taken only as against that person and persons, bodies politic and corporate, his and their heirs, successors, executors, administrators and assigns, and against all and every other person and persons lawfully having or claiming by, from or under them, or any of them, which have purchased or shall hereafter so purchase for money or other good consideration, the same lands, tenements or hereditaments, or any part or parcel thereof, or any rent, profit or commodity in or out of the same, to be utterly void, frustrate, and of none effect; any pretence, color, feigned consideration, or expressing of any use or uses to the contrary notwithstanding.

3. And be it further enacted by the authority, aforesaid, That all and every the parties to such feigned, covinous and fraudulent gifts, grants, leases, charges or conveyances before expressed, or being privy and knowing of the same or any of them, which after the twentieth day of April next coming shall wittingly and willingly put in ure, avow, maintain, justify or defend the same or any of them, as true, simple, and done, had or made, *bona fide*, or upon good consideration, to the disturbance or hindrance of the said purchaser or purchasers, lessees or grantees, or of or to the disturbance or hindrance of their heirs, successors, executors, administrators or assigns, or such as have or shall lawfully claim any thing by, from or under them or any of them, shall incur the penalty and forfeiture of one year's value of the said lands, tenements and hereditaments so purchased or charged; the one moiety whereof to be to the queen's majesty, her heirs and successors, and the other moiety to the party or parties grieved by such feigned or fraudulent gift, grant, lease, conveyance, incumbrance or limitation of use, to be recovered in any of the queen's courts of record, by action of debt, bill, plaint or information, wherein no essoin, protection or wager of law shall be admitted for the defendant or defendants; and also, being thereof lawfully convicted, shall suffer imprisonment for one half year without bail or mainprize.

4. Provided also, and be it enacted by the authority aforesaid, That this act or any thing therein contained shall not extend or be construed to impeach, defeat, make void or frustrate any conveyance, assignment of lease, assurance, grant, charge, lease, estate, interest or limitation of use or uses, of, in, to or out of any lands tenements or hereditaments heretofore at any time had or made, or hereafter, to be had or made, upon or for good consideration, and *bona fide*, to any person or persons, bodies politic or corporate; any thing before mentioned to the contrary hereof notwithstanding.

5. And be it further enacted by the authority aforesaid, That if any person or

‖abhors all fraud, would make void this gift as to the Queen (2). Lord Coke has in three different places(3)‖remarked upon the 9 force of the word "declare" (4) with which the enacting part of the statute‖ 13 Eliz. c. 5. is introduced, as imply- 10 ing a legislative recognition of the common law.

In opposition to this, we find it agreed in *Twyne's* case (5), that by the common law an estate made by fraud should be avoided only by him who had a former right, ‖title, interest, 11 debt or demand ;* and that though by the common law a covinous

persons have heretofore sithence the beginning of the queen's majesty's reign that now is, made or hereafter shall make any conveyance, gift, grant, demise, charge, limitation of use or uses, or assurance of, in or out of any lands, tenements or hereditaments, with any clause, provision, article or condition of revocation, determination or alteration, at his or their will or pleasure, of such conveyance, assurance, grants, limitations of uses or estates of, in or out of the said lands, tenements or hereditaments, or of, in or out of any part or parcel of them, contained or mentioned in any writing, deed or indenture of such assurance, conveyance, grant or gift; and after such conveyance, grant, gift, demise, charge, limitation of uses or assurance so made or had, shall or do bargain, sell, demise, grant, convey or charge, the same lands, tenements or hereditaments, or any part or parcel thereof, to any person or persons, bodies politic or corporate, for money or other good consideration paid or given (the said first conveyance, assurance, gift, grant, demise, charge or limitation, not by him or them revoked, made void or altered, according to the power and authority reserved or expressed unto him or them in and by the said secret conveyance, assurance, gift or grant), That then the said former conveyance, assurance, gift, demise and grant, as touching the said lands, tenements and hereditaments, so after bargained, sold, conveyed, demised or charged, against the said bargainees, vendees, lessees, grantees and every of them, their heirs, successors, executors, administrators and assigns, and against all and every person and persons which have, shall or may lawfully claim any thing, by, from or under them or any of them, shall be deemed, taken and adjudged to be void, frustrate, and of none effect, by virtue and force of this present act.

6. Provided nevertheless, That no lawful mortgage made or to be made *bona fide*, and without fraud or covin, upon good consideration, shall be impeached or impaired by force of this act, but shall stand in the like force and effect as the same should have done if this act had never been had nor made; any thing in this act to the contrary in anywise notwithstanding.

(2) Skin. 357. Jones v. Ashhurst per Holt acc.

(3) 3 Rep. 82 b. Co. Litt. 76 a. 290 b.

(4) and see in 3 T. R. 546. the observations of Lord Kenyon C. J.

(5) 8 Rep. 83.

* Rev. Stat. Vt. ch. 60. sec. 28. Where a deed is executed by the grantor with intent to avoid any right, debt or duty of others, and the grantee is knowing to

gift would not be suffered to defeat an execution issued in respect of a former debt, according to the Book (6), yet that he who had right, title, interest, debt or demand more puisne, should not avoid a gift or estate precedent gained by fraud before the statutes (7); and in confirmation of this latter position it was said by Yelverton in *Upton* v. *Bosset* (8), and conceded by the whole court, that at common law there was not any fraud remedied which should defeat an after purchase, but that only which was committed to defraud a former interest. And it is worthy of observation that Owen, J. who was one of those who decided the case in Croke last mentioned, and agreed with the exposition of the object and operation of the statute given by Yelverton, declared himself to have been present at the making of the statute, and to have well understood the designs and motives of the framers. The genius of the common law of England, it is
12 true, opposes itself to ‖every species of fraud, so that nothing can have legal validity which has apparent fraud in its composition; but as the common law is tender of presuming fraud from circumstances, and expects that it be manifest or plainly inferible, statutes have been framed of preventive efficacy, whose object it has been to embarrass deceitful contrivances by requiring, as the characteristics of honesty and truth, certain badges and distinctions which it is impossible or difficult for fraud to assume; grounded upon an opinion, as may be supposed, that though honorable dealing may be sometimes exposed by these tests to inconvenience and misconstruction, yet the weight of the inconvenience presses upon all the contrivers of fraud who are called upon for those signs and credentials which virtually involve the destruction of their schemes. *Satius est a paucis justam excusationem non accipi quam ab omnibus aluiquam tentari.* No statutes, it is true, can make that fraudulent which was not fraudulent before: in this view, all statutes
13 against fraud are simply declaratory of the common‖law; but they appear to have been framed either with the design of multiplying the difficulties of fraud by insisting on those signs of innocence which are the least reconcileable with fraudulent pur-

(6) Vid. 22 Assize, pla. 72 (7) Lane 105. (8) Cro. Eliz. 444.

such intention at the time of receiving the deed, such deed is void though the grantee have no intention to defraud the creditors of his grantor and pays an adequate consideration for the property. Edgell v. Lowell, 4 Vt. R. 405.

poses or of supplying by artificial tests the antiquated ceremonies of authentication which in the simple ages of the law accredited the ordinary transfers of property.

The first expounders of the statutes of Elizabeth against fraudulent conveyances have given them a very strong construction against voluntary dispositions; and particularly the statute made for the protection of creditors they have understood in a sense correspondent to the probable intention of the makers to supply the defect of the common law and of former ‖statutes (*c*), where they fell short of relieving those whose 14 debts had arisen subsequently to the fraudulent alienation (*d*). They resolved upon such a construction of both these statutes as might extract from them an operative and beneficial law, and, as they seemed purposely written in general language to give room for a more extended judicial interpretation, they considered largely their spirit and purview, and framed upon them certain rules of evidence for the suppression of fraud, which as they are the result of strong sense, ‖and founded in general utility, 15 ought not to be lightly departed from for the sake of obviating particular hardships.

They seemed to be of opinion, that both these statutes would be inoperative, unless they collected from them a spirit denunciative of voluntary gifts and conveyances, when opposed to the claims of creditors and purchasers for valuable consideration. At the same time, they shewed an inclination to limit the import of

(*c*) The stat. 50 Ed. 3 c. 6. extended only to the case of persons who, to defraud their creditors of all remedy, conveyed their property in trust, and then eluded execution against their persons by flying to sanctuaries and privileged places; but it seems, that where their persons remained exposed to execution, such sale or assignment was not fraudulent within that act. Dyer 295 a, b. Co. Litt. 76 a. The stat. 3 H. 7. c. 4. seems to carry the relief further than the 50 Ed. 3. c. 6. for, though the preamble recites the practice of flying to sanctuaries as part of the evil to be remedied, the enacting part is general, and seems so to have been considered. Cro. Eliz. 291. Dyer 295 b. But this statute is confined to gifts of goods and chattels. The stat. 1 Ric. 2. c. 9. touches only cases, which cannot now happen, of fraudulent gifts to great men for maintenance against the suits of creditors.

(*d*) In the case *Taylor* v. *Jones*, 2 Atk. 601. Lord Hardwicke observed upon the words in the statute 13 Eliz. "to defraud creditors and others," that the word *others* seemed to have been inserted to take in all manner of persons, as well creditors after as before the conveyance, whose debts should be defrauded.

the word voluntary to those cases only wherein no inducement of interest appeared, and to extend the notion of valuable consideration to whatever cases admitted a natural supposition that one act was made the condition of another, or that in a general compromise or adjustment of interests a thing was parted with, which could legally have been withheld, in furtherance of the general provisions of a settlement. With this liberal understanding of the words *voluntary* and *valuable* they thought, as it seems, that a severe construction would best advance the remedy intended by these statutes, and that their true meaning was
16 to afford a strong protection to *bona fide* creditors and ||purchasers against specious precedent transfers not induced by those ordinary expectations of recompence which are likely to influence men to part with their own; more particularly with respect to the statute 27 El. c. 4. to have permitted reasons, founded on the inducements of natural love however respected in law (*e*), to prevail against subsequent purchasers, would have tended, in a great measure, to defeat the effect and intent of that statute, since there is an additional ground for the suspicion of secret coalitions to the prejudice of others where the parties to the transaction are within the influence of such private motives and affections. And so severe is the operation ascribed to the statute last mentioned, that the purchaser has always been held to be unaffected by notice of the precedent conveyance (9). The voluntary transfer is void as to him, and he is safe in treating it as an absolute nullity. A diversity of construction has, how-
17 ever, on some ||points prevailed in respects to the stat. 13 and stat. 27 Eliz. and the earliest decisions of the courts have shewn a degree of favor to voluntary gifts against *creditors*, whose claims have arisen upon subsequent contracts which has not been extended to conveyances without valuable consideration, as against a subsequent *purchaser*, although no treaty for the subsequent purchase was in existence, or in contemplation, at the time of such voluntary conveyance.

It is only, however, under particular circumstances, that this support has been allowed to voluntary gifts against *bona fide*

(*e*) See a pleasing picture of the tenderness of the law for the parental and fraternal affections in Plowd. Com. 307. *Sharrington* v. *Strotton*.

(9) 5 Rep. 60. Cowp. 711, 712.

creditors upon subsequent contracts; the bare circumstance of the non-existence of the particular debt at the time of the voluntary alienation is not always a sufficient ground for sustaining it. The transaction is subjected to a more scrupulous test, and two requisites to its validity have generally been insisted upon. The conveyer must stand generally uninvolved at the time of making his voluntary gift or disposition; for it seems to be established as a rule, ‖that if he is then incumbered with debts, such 18 his voluntary alienation will be as void against debts since contracted as against those which were previously existing; and according to the soundest opinions, such voluntary dispositions will not be valid against subsequent creditors, unless they are supported by the strong obligation of a parent to secure a provision for his offspring (10). The opinions of Lord Hardwicke on this point are pretty clear and uniform; and a proper attention to the sentiments of that Judge might perhaps rescue this part of the subject from the desultory and floating state into which, according to some opinions, it has been thrown. In the case of *Russel* v. *Hammond* (11) Lord Hardwicke is made to say, that "though he had hardly known one case, where the person conveying was indebted at the time of the CONVEYANCE, that the conveyance has not been deemed fraudulent; yet that, to be sure, there were cases of voluntary SETTLEMENTS that were not fraudulent, and those were, where the person making them was not indebted at the time, in which case subsequent debts would ‖not shake such settlements." We observe, that in 19 the latter part of this remark the word *settlement* is used instead of *conveyance*, which first occurs; for what is secondly stated in the foregoing observation is true only of settlements or conveyances by way of family provision, and not of voluntary conveyances to strangers, which, notwithstanding the person conveying is not indebted at the time of making such conveyances, will, it seems, yet be fraudulent under the stat. 13 Eliz. c. 5. and by virtue of that statute utterly void against all subsequent creditors. And even voluntary provisions for a man's own family, if the settlor be indebted at the time *(f)*, are void

(10) Style's Reports, 446. 1 Brown's Chan. Rep. 90. (11) 2 Atk. 13.

(f) In the case of *White* v. *Sansom*, 3 Atk. 410. Lord Hardwicke dismissed the bill of a person claiming as a creditor, principally because it was *doubtful*

||against his general creditors, as well with respect to those whose debts are subsequent (12), as to those whose debts are precedent to such provisions.* In the case of *Russel* v. *Hammond* above referred to, the general creditors did not rest their claims merely on the circumstance of the settlement being voluntary, but on the concomitant fact of the settlor being largely indebted at the time of making the settlement; and although their bill was dismissed as to some part of the estate in settlement, which turned out to be sustained by a valuable consideration, the chancellor made it appear clearly to be his opinion, that if the settlement *had* been *voluntary*, it could not have been supported against the general creditors, because the settlor was incumbered *(g)* at the time of making it.

But the words of Lord Hardwicke above cited extend no further than to shew, that *there were cases* of voluntary settlements not fraudulent against creditors, where the persons
21 making them were not indebted at ||the time. They cannot be interpreted as laying down a rule, that *all* voluntary settlements are good against subsequent creditors, even if the settlors are unincumbered at the time of making them (*h*); and indeed, that such general maxim was not adopted by his Lordship, appears by the decision in *Russell* v. *Hammond*, with respect to one part of that case, for there being no valuable consideration to support the settlement made by the son, *William Hammond*, of his own estate, though it did not appear that he was at all indebted at the time of making the settlement, but rather the contrary is inferible from the stress laid upon this circumstance by the

whether the debt accrued before or after the settlement, which shews the leaning of the court of chancery in favor of family provisions.

(g) See the remark by the court in *Taylor* v. *Jones*, 2 Atk. 602. "If a man is in indigent circumstances at the time of making the settlement, it is evidence to shew, that it was made with an intent to commit a fraud.

(h) In the case of *Jones* v. *Marsh*, Cas. Temp. Talb. 64. Lord Talbot declined giving any opinion how far a family settlement, without any consideration, would be fraudulent against subsequent creditors, though the party was not indebted at the time.

(12) 1 Atk. 94, Walker v. Burrows, 2 Atk. 600, Taylor v. Jones.

* A voluntary conveyance, made without consideration, by an individual who is insolvent, is void against creditors existing at the time. And is also void against subsequent creditors, if made with a fraudulent intent, in reference to their claims. Carlisle v. Rich, 8 N. H. 44. 6 N. H. 67.

creditors in the question respecting the settlement by the father, and the silence of the case respecting it in regard to the son's settlement, such settlement by the son was held fraudulent and void against the creditors, who were decreed to be relieved accordingly.

‖Neither will the attentive reader of the few cases and 22
opinions in the books which bear directly upon this point be satisfied with the simple distinction above noticed between voluntary family settlements and voluntary conveyances to strangers, or be inclined to adopt it as a general rule, that a voluntary settlement merely as such made by one not indebted at the time, is, at this day, safe against subsequent creditors; but the investigation will, perhaps, conduct him through some perplexity to a subdistinction between voluntary family settlements themselves, in which something like a principle is discoverable of decisive application; he will observe an accepted implicit distinction between a voluntary settlement made before children born, and one made after issue, in respect to its validity as against *subsequent* creditors; and that the most favored sort of settlement is that which is induced by paternal tenderness, by way of provision for a child or children in being *(i)*. 23

This favor of the law towards provisions for children is

(i) In *Walker* v. *Burrows*, 1 Atk. 94. the voluntary settlement was made in favor of children in being; and Lord Hardwicke there observed, adverting to the effect of the stat. 13 Eliz. c. 5. that it was necessary to prove, that the person conveying was indebted at the time of making the settlement or *immediately after the execution of the deed;* that a different notion, were it to prevail, would be attended with bad consequences, because the stat. extends to goods and chattels, and would defeat every provision for children and families, though the father was not indebted at the time. The case, however, of *Stileman* v. *Ashdown*, 2 Atk. 481. furnishes an exception to this rule, wherein it appears, that a settlement upon children, though made by a person not indebted at the time, may yet be void as against subsequent creditors, if any thing in the transaction affords ground for an inference that the provisions were made with a view to becoming indebted. See post, p. 25. et seq.

The case of *Hungerford* v. *Earl*, 2 Vern. 261. does not accord with the opinion of Lord H. as expressed in *Walker* v. *Burrows;* for there the bond debt, against which the voluntary settlement was held void, *was contracted* 12 *years after* the making of the settlement; but there was another strong ingredient in that case, *viz.* the possession of the father, nothwithstanding the conveyance to the trustees, which seemed very much to influence the judgment of the Lord Commissioner.

distinctly stated by Lord Hardwicke in the case of Lord *Townsend* v. *Windham* (14), in the following words: "If there
24 is a voluntary conveyance of real ||estate or chattel interest by one not indebted at the time, though he afterwards becomes indebted, and that voluntary conveyance is for a child, and without any particular evidence or badge of fraud to deceive or defraud *subsequent* creditors, that will be good; but if any mark of fraud or collusion, or intent to deceive or defraud *subsequent* creditors, appears, that will make it void, otherwise not, but it will stand, though he afterwards becomes indebted;" and then follows this very important observation: "But I know no case on the 13th Eliz. where a man, *indebted at the time*, makes a mere voluntary conveyance to a child (15), and dies indebted, but that it shall be considered as part of his estate for the benefit of creditors."* Here we may observe, that his Lordship's remark, as to the effect of circumstances discovering an intent to deceive, is included within the universal rule, that such an intent to deceive, where it appears, supersedes the whole question about consideration, and reduces the purely voluntary conveyance, the provision for offspring, and the conveyance
25 for value, to the same ||nullity of operation. The whole of *Twyne's* case, turned upon the intent to deceive, as inferible from circumstances; the conveyance in which case was not voluntary, but made to a *bona fide* creditor, whose demand exceeded the value of the goods assigned to him; and if it were not a *clear* consequence, that the reasons which make a conveyance for value vicious must invalidate a vountary conveyance, though meant as a provision for a child, the case of *Stileman* v. *Ashdown* (16), would establish the corollary.

This case comprehends two questions; 1st, Whether a settlement made after marriage, but expressed to be in consideration of a marriage portion by a person not indebted at the time was void against subsequent creditors; as to which the Chancellor thought it extremely clear, that, as the settlement, though after

(14) 2 Ves. 10. Vide also Middlecome v. Marlow. 2 Atk. 520.
(15) 3 Rep. 81 b. (16) 2 Atk. 481.

* A voluntary conveyance, made by a grantor in favor of his wife and children, when he is about to engage in new and hazardous business, is a strong badge of fraud. Thompson v. Dougherty, 12 S. & R. 448. See 4 Vt. R. 389. 6 Vt. R. 411.

marriage, was in consideration of a marriage portion, which *for any thing that appeared*, was paid at the time, it could not be impeached by ||subsequent creditors. But the 2d question 26
arose upon the following facts: Some time after his marriage in the year 1700, the father, *not being indebted at the time*, made a purchase jointly with his eldest son, who was first tenant in tail under the settlement, and took a conveyance to them and their heirs. In 1708, he made another small purchase of land jointly with his youngest son, and settled it also by way of provision. The father paid the purchase money for both estates, and continued in possession till his death, which happened in 1735. But in the year 1721, he confessed a judgment to the plaintiff's testator. Upon the father's death, the sons respectively entered into the said estates, and afterwards the plaintiff, as executor of the conusee of the judgment, insisted by his bill, that these estates were subject to his testator's judgment. It was contended at the bar that these two purchases were to be considered as advancements to the sons, and consequently that they were entitled to retain the estates against the claim under the judgment; but the opinion of the court was, that these purchases, in the names ||of the father and the son jointly, did not answer the 27
purpose of advancements; for if the son had died during his minority, though married and leaving issue, the father would have been entitled to the whole by virtue of the survivorship, and the son, being an infant, could not have prevented it by severance: and upon this part of the case, his Lordship strongly observed, that "it is not necessary that a man should be actually indebted at the time of his making a voluntary conveyance to render it fraudulent; for if he does it with a view *(k)* to his

(k) Which view may be collected and inferred from other circumstances, besides the want of aptitude in the settlement to answer the pretended purpose of advancement. Disproportion between the provision and the object, as well as incongruity between the means and the end, seems to justify the inference of fraudulent intention. As where a husband, having large estates, settles the whole of his property, or subjects himself to unusual restrictions, or where the objects of his care are already provided for, or where he cripples his own power of enjoyment and disposition, by an unreasonable and excessive liberality towards his family. All these are, as it should seem, badges of fraud, though the settlor be not indebted at the time.

In the case of *Fitzer* v. *Fitzer*, 2 Atk. 511. which will be hereafter commented upon for a different purpose, the debt of the creditor arose subsequently to the voluntary settlement.

being indebted at a future ||time, it is equally fraudulent, and ought to be set aside; and his Lordship resembled the case he was deciding to that of *Christ's Hospital* against *Budgin and Wife*, reported in 2 Vern. 683, where a husband, having taken several mortgages and bonds in the name of himself and his wife, for money lent by himself, the Lord Keeper looked upon the wife surviving him to be in the nature of a joint purchaser, and decreed against the heirs at law, but admitted that in the case of *creditors*, it might be fraudulent. If the principles above extracted be right, it would have been fraudulent against creditors, whether the husband did or did not stand clear of debts at the time the bonds and mortgages were taken; and indeed, besides the suspicion which adheres to such creation of joint interests, it may be doubted whether that protecting construction which shields these provisions for unportioned children, extends itself to mere gratuitous settlements on wives.

29 The decision in the case of *Stileman* v. *Ashdown* ||shews, however, that the purpose of providing for a *child* must be unambiguous, and that the conveyance or settlement must be plainly calculated to effectuate the object proposed; for we collect by inference from that case, that without any of those extrinsic badges enumerated in *Twyne's* case, (for though the father had possession till his death, the presumption of fraud from that circumstance is answered by the title to the possession, which, as a father, he might claim by right of natural guardianship during the nonage of his child,) a pretended provision or advancement may stand condemned by its own inadequacy and incongruity, with respect to the design professedly in the contemplation of the parent and settlor.

SECTION II.

30 ||The phrases 'intent to defraud' and 'intent to deceive,' which occur in the statutes under consideration, have sometimes received a latitude of exposition from the resolutions in modern cases, which does not correspond with the ancient deci-

sions of judges familiarly conversant with the views of the legislature in framing those statutes.*

Fraud consists either in a single act, or in a *continued* series of acts, and two parties are always necessary,—a person deceiving, and a person to be deceived,—to give it that action and determination which renders it the subject of human cognizance and law (17.) A general purpose of fraud existing in the heart of a man, without a particular object, cannot be crime in any system of *human* law. Where fraud is made up of distinct acts their connexion becomes difficult to be traced and ascertained in proportion to their reciprocal distance, and the multiplicity of events with which ||they are incidentally connected. In a 31
less complex state of manners its artifices were of simpler contrivance: deceit took a shorter aim; the scheme and the final object were separated at smaller intervals, and were generally present at the same time to the view of the close observer. The multiplied relations of life have refined the arts of deceit. As fraud has become more dextrous, its views have become more distant and less direct. And the prospective connexion between the original act and the ultimate purpose requires a longer course of deduction for its discovery and ascertainment. The preventive activity of the law ought to increase in proportion to this growing difficulty of detection. Where the regular methods of scrutiny are baffled by evasive dexterity, summary expedients must be used, and the law provides for its own imbecility by sternly discountenancing all mystery and ambiguity of

(17) 9 H. 6. 53. Poph. 143. Bridg. 128.

*A deed is fraudulent in law, if made by both parties to it, with intent to defraud creditors, though there be a valuable consideration paid. Codagan v. Kennett, 4 D. & E. 432.

It is held in Vermont, that if the grantee is knowing to the fraudulent intent of the grantor, although he has no wish himself to defraud, and pays a valuable consideration, that the deed is fraudulent and void against the creditors of the grantor. 4 Vt. R. 405. Astor v. Wells, 4 Wheat. 466.

But in the following cases it has been held that the deed is fraudulent, though a *bona fide* grantee knew nothing of the fraud. Beale v. Guernsey, 8 Johns. R. 446; Wickham v. Miller, 12 Johns. R. 320; Hildreth v. Sands, 2 J. C. R. 35.

The title of a purchaser for a valuable consideration cannot be defeated by a prior voluntary settlement, of which he had no notice, though he purchase of one who obtained his conveyance by fraud, of which he the purchaser was ignorant. Doe dem. Bothill v. Martyr, 1 N. R. 332.

action. The luxuriant intricacy of the legal modes of transfer and forms of technical proceedings, as they multiply the means of fraud, so they call for the increased vigilance of the law
32 against colorable and ‖equivocal transactions. Legal artificial presumption at length comes in aid of this vigilance, and where experience has pointed out a successful engine of fraud, the very use of that engine is made in some cases to supersede inquiry into intention, by being itself turned into a strong presumptive indication of fraudulent design. The hardship of such presumptions (if any there be) is outweighed by their utility; nor ought we to forget the difference between stated presumptions by statute *(l)*, which are express and cautionary rules of conduct, and the presumptions of unwritten law, of which the heads of the learned are the only repositories. If a rule of construction, with respect to our transactions with each other, is for the public good, it is only necessary that it be clear and ostensible; and no man can reasonably complain of a restriction upon his individual,
33 which benefits him in his social ‖capacity, if the terms of that restriction be intelligible, general and certain.

The earliest expounders of the statutes of Elizabeth against fraudulent conveyances, appear to have attributed to both of them a spirit and meaning consonant to what has just been surmised: but they thought it more pointedly within the expression of the 27 Eliz. c. 4. to construe a voluntary gift or conveyance, if followed, though after a long interval, by an attempt to convey to a purchaser for valuable consideration, as strong *presumptive* evidence at *least* of an intent to deceive. They determined, however, that the voluntary conveyance was good considered by itself, and good against all but one who purchased for a consideration of value; but that when a purchaser of that description appeared, the first conveyance, coupled with the subsequent attempt to sell for value, made up a compounded evidence of fraudulent intention. The absurdity of making that fraud by *ex post facto* circumstances which was not fraud in the commencement ‖*(m,)* cannot with reason be objected. 34

(l) Lord Mansfield in 2 Burr. 1072. states the distinction between presumptions grounded upon evidence, and presumptions of law, which are not to be contradicted. The statutory presumption alluded to in the text seems to be a third sort, depending upon an arificial rule of construction.

(m) Vid. Chan. Cas. in Lord King's time, *Dew's* v. *Brand*, and see the remark, by Doderidge, J. 2 Roll. 306.

Such objection is answered by the difference between *making* and *proving*, for though an act, which must be considered as innocent when committed for want of evidence of the contrary, cannot be made criminal by subsequent events, yet evidence and presumption may well arise from subsequent events to annex a construction of guilt to that which stood free from imputation at first *(n)*. The principle of this observation applies also to the statute of 13 Eliz. where debts are contracted subsequently to the voluntary conveyance, and where those grounds of favor which have before been considered do not exist in the case.

In looking a little more inquisitively into the nature of this presumption of fraud or intent to deceive, as it arises upon these statutes, we are led to observe that || the fraud does 35 not consist in the actual deception of the purchaser or creditor, but in making a conveyance with a *view* to deceive or defraud them, which intent to deceive or defraud cannot be manifest and determined until a purchaser or creditor arises: the whole is then regarded as one transaction by relation, and the fraud in the contemplation of the statutes is then complete. With respect to the statute 27 Eliz. c. 4. all that is necessary to be shewn, as constitutive of the fraud thereby intended, is a conveyance made with an intent to decive a purchaser. This intent to decive is evident by a voluntary conveyance, coupled with a subsequent agreement to sell the subject of that voluntary conveyance, and the fraud being complete in this stage of the transaction, the purchaser may execute his bargain notwithstanding he has notice of the former voluntary conveyance(18). It is not the accomplishment of the deceit on the purchaser that constitutes the fraud, but the deceitful intention in the seller manifested by his proceeding to the second conveyance. Though the purchaser be not deceived, a voluntary conveyance may still be fraudulent *(o)*, and ||if so it is consequently void as against 36

(n) Vid. *Colville* v. *Parker*. Cro. Jac. 158. "Because it was a voluntary conveyance at first, and shall be intended fraudulent at the beginning." For the numerous instances in which, in our law, subsequent acts are admitted to expound original intention, vid. *Downman's Case*, 9 Rep. 11. Wingate's Maxims, Max. 37. Vid. also Lane 47. and Plowd. Com. 473. et seq.

(18) Vid. Gooch's Case, 5 Co. 60 a. Eq. Cas. Abr. 334. Ambl. 288. Cowp. 280. 2 Brown C. R. c. 148.

(o) In *Gough's* case the opinion of Ld. Wray seems to rest upon a conclusion that the fraud is complete and sufficiently proved according to evidence impli-

him if he completes his purchase; and the completion of his purchase by an executed conveyance (19) is necessary to qualify him under the statute to avoid the first conveyance, for the statute is express that the first conveyance shall only be
37 void against the purchser, or ‖those claiming under him *(p)*.

But by this avoidance of the first conveyance, besides the protection of the purchaser, the statute has secondarily in view the punishment of the deceit, and as the voluntary alienee is regarded by the jealousy of the law, where circumstances and parties afford a possible ground for the presumption, as a participator in the fraud, he is involved in a common loss by the operation of the statute.

The loss to the seller is not so easily understood by those who regard only what has been the consequence of the statute, namely, the oportunity thereby given to the voluntary conveyer to defeat his own antecedent gift by a sale for valuable consideration. But their difficulty is only the difficulty of intellectual separation. It arises, from viewing the consequences of that law as it *has* been since acted upon, instead of the pre-existent evil against which it provided. Before that statute, the purchaser was the party intended to be injured—the injury of the unsuspecting buyer was the speculation of the fraudulent seller. The scope and purpose of the act being wholly preventive, could not,
38 ‖with consistency, look to the future existence of the thing against which it was made. It was calculated to remove and not to remedy. This mischief in its contemplation was annihilated by its provisions, and we take a wrong ground when we look to existing evils in the interchange of property for the

edly marked out by the statute, in the very proposal to sell. He put this case. A. seized of land in fee makes a fraudulent conveyance with an intent to deceive and defraud perchasers against the statute 27 Eliz. and continues in possession, and is reputed owner. B. enters into *discourse* with A. for the purchase of it and by *accident* B. has notice and knowledge of this fraudulent conveyance, and nevertheless concludes with A. and takes his assurance of him, in this case B. shall avoid the said fraudulent conveyance notwithstanding the notice.

(p) So with respect to the relief which a court of equity gives on the 13 Eliz. c. 5. a creditor must complain, or a settlement cannot be set aside for fraud, and he must put himself in a situation to complain, by getting judgment for his debt, and stating that by the settlement he is defrauded. Vid. 1 *Vesey, Jun.* 160.

(19) Vide the case of Holford v. Holford, Chan. Cas. 216.

explanation of that law. Before the statute 27 Eliz. the purchaser was the party in danger, and the hopes of advantage were with the projectors of the fraud against him, *videlicit*, the parties to the voluntary alienation. The efficacious prevention of that deceit, against the possibility of the return of which the statute provided, ought to be the governing rule in the construction of its clauses, and to this purpose the potential existence of the mischief suppressed should be regarded as an actual and instant peril. The statute was meant to bear upon the voluntary alienee, and to relieve the purchaser; but the safety of the purchaser produced by its successful operation has turned the regards of compassion towards the case of the voluntary alienee; and we are apt to forget that, besides the unsteady direction and relaxing effect of these sympathies in the construction of
‖a general law, the peril to the purchaser must revive under 39
indulgence to the donee, who cannot be favored on any general principle of compassion, but at the expense of a claim more strong and meritorious.

By thus considering the avoidance under the statute 27 Eliz. both as protective and suppliciary, and by regarding the fraud as perfected in its essence, though unexecuted in its object, by the voluntary conveyance made with intent to deceive, of which fraudulent intent the subsequent contract is the proper evidence, we see the reason of the unimportance of notice to the subsequent purchaser, who, if he has knowledge of the conveyance, sees the fraudulent intent disclosed in the very treaty of sale, and has only to complete his purchase, that by virtue of the valuable consideration, he may become qualified under this statute to treat *that* as void which he before perceive to be fraudulent. A direct notice communicated by the seller to the purchaser before the purchase completed, implies a self-contradiction, and was not to be supposed or provided for, and when the cases said
that the ‖ voluntary conveyance was void against the pur- 40
chaser, notwithstanding such purchaser had notice, another kind of notice than that first mentioned must have been in contemplation.* If the notice is intrinsically contained in

*Whenever the legal title is in A., and B. has an equitable interest or claim on it, and C. purchases it of A. or B., his title will be materially affected by notice of the interest of the other. If A.'s creditors have an equitable claim

the deeds which accompany the sale, though in common cases such notice may enervate the title and blemish the innocence of the purchaser, as where a man takes a conveyance of legal estate with knowledge of an adverse equitable title or incumbrance, yet where the question turns wholly upon the intent to deceive in the vender, it cannot be said that the vender has purified himself by delivery of the title deeds, while he is silent as to the existence of a fact overthrowing the title (*q*), which, though it might appear by an examination of the deeds, he has tacitly contra-
41 dicted by the very treaty of sale. If notice comes || to the purchaser from the voluntary alienee, or through any other extrinsic collateral or casual channel, that clearly can be no restoration of the innocence of the seller—his original intent to deceive remains unabsolved.

The decisions, however, in favor of purchasers with notice have by some been looked upon as unreasonable and unjust; but they cannot be unreasonable and unjust if they have followed up the spirit of the statute, and if that spirit was reasonable and just, both which positions it is the object of these sheets to establish. It has been said that "if the construction of this act, which has certainly prevailed in favor of purchasers with notice, were traced, it would probably appear to have originated in the opinion that the act avoided all voluntary conveyances whatever, though, continues the writer, it merely affects fraudulent conveyances (20)." The great question in these cases is whether the particular conveyance or settlement be void or effectual: it cannot be
42 only voidable: it is ||radically bad or good with respect to subsequent purchasers (*r*); and the question whether notice or

(*q*) This must be understood retrospectively to the time when the statute was made, the provisions of which necessarily suppose such a consequence from making a voluntary conveyance, and afterwards a sale to a purchaser.

(20) Fonbl. Treat. Eq. 1 vol. 271. note.

(*r*) The case cited in 2 Roll. 35. is very strong to shew this subversive effect of the statute 27 Eliz.—A voluntary conveyance was made with a fraudulent power of revocation, and the person who made the conveyance, afterwards bar-

on his estate, and he conveys it, to wrong them, to B. who has notice of this claim, B.'s title is bad and he will be considered as trustee. *Crane* v. *Stickles & Trustee.* 15 Vt. 252; R. S. Vt. Cap. 29. sec. 34; 2 N. H. 93.

But see *Baxter et al.* v. *Currier & Trustee*, 13 Vt. 615; *Hutchins* v. *Hawley*, 9 Vt. 295.

not to a subsequent purchaser must either influence and be involved in the decision of that principal question, or it must come after it and control the consequences to be inferred from it. But it cannot be involved in the decision of that question if the accident of notice to a purchaser may be consistent with an intent to deceive however that intent may have failed of its accomplishment, and if a direct express notice cannot be supposed in the case. An attempt has already been made to shew, that a casual indirect notice is no proof of honesty of intention in the seller. Though a direct express notice immediately communicated from the seller to the purchaser is certainly inconsistent with ‖an in- 43
tent to deceive such purchaser, yet we cannot suppose such folly in the seller as that he should give such notice without taking it first for settled that his former voluntary conveyance was void, for otherwise it would imply a contradiction of his own proposal to sell.* No reasonable man, therefore, would himself give such notice but because he relied upon this neutralizing construction of the statute with respect to all notice whatsoever. If such notice would vitiate the sale, it is plain the person intending to purchase would break off the treaty. We cannot suppose such a notice, therefore, but as a consequence of the nullity of effect given to it by the before-mentioned construction of the statute, and as impossible to have happened without absurdity before such a construction was settled. We must suppose, therefore, all notice to be inoperative before such an express notice can be supposed to be given, and consequently in the discussion of the question, whether notice to a purchaser be operative or

gained and sold the subject of that conveyance for valuable consideration, upon a condition: the condition was broken and yet the first conveyance was not restored, for the estate having been once sold to a purchaser, the first conveyance was irrecoverably gone by the construction of the statute.

* Notice must be real, and must come from one concerned; but it may be implied. Wildgoose v. Wayland, Golds. 147. Cromwell's case, Tothill, 254.

Notice to an attorney or agent of a purchaser, is notice to him. Astor v. Wells *et al.*, 4 Wheat. 446, 448.

Any matter sufficient to put a purchaser upon inquiry, is good notice to him; as when he sees one in possession acting as one having claim. Jackson v. Cadwell, 1 Cow. 622; 15 Johns. R. 537; 1 Gallis. 41; 1 Wash. C. C. R. 70.

Lis pendens is constructive notice to a purchaser. 3 Hammond's (Ohio) R. 541; Dane's Abr. Chap. 116, art. 6, sec. 8, and cases there cited.

not, we must exclude the idea of a notice express and direct. By getting rid of this idea we deliver the ||subject from a sort of puzzle or *petitio principii*, or, in other words, from the difficulty created by fallaciously confounding with the terms of the question a subject matter which without an absurdity cannot be supposed to exist till the question is decided.

If this full express notice imparted immediately by the seller, or by his authority to the purchaser, cannot be supposed to happen but upon an assurance that the first conveyance was void, it must imply also an assurance that once void it is incapable of confirmation.

If the first conveyance be not void, then notice cannot deteriorate the condition of the purchaser. If, on the other hand, the first conveyance be void, subsequent notice however imparted can have no effect, in such case the operation of notice is anticipated by the destruction of the subject* *(s)*.

(s) Buller v. *Waterhouse*, reported in Sir Thomas Jones, 94. was a case upon a power of revocation included in a settlement by a father and mother on
45 their son's marriage, which power ||being restrained to be exercised only with the consent of four trustees, or the survivor of them, was adjudged out of the statute 27 Eliz. c. 4. And there was there a plain valuable consideration: It is true that Pollexfen at the bar mentioned the circumstances of notice as to the purchaser as precluding any inference of fraudulent intent as against him, but as there was quite enough in the case to support the settlement without any resort to this reasoning, it cannot be known what stress the court laid upon it.

And in *Fitz-James* v. *Moys*, 1 Sid. 133. that the purchaser had no notice of the first conveyance, is made an ingredient in the statement of the case, yet as it does not appear to have made any part of the foundation of the opinion of the court in the direction given to the jury, it is only a proof of the sense the reporter entertained of its importance.

The same observation applies to the case of *Colville* v. *Parker*, Cro. Jac. 158. quod vid.

Where facts, which have no influence on the judgment of the court, find their way to the statement of a case, the student is sometimes misled by the reporter's apparent appreciation of them too hastily to conclude them of importance. In *Goodright* v. *Moses*, 2 Black. 1019. where the purchaser of the estate

* As to the registration of deeds being notice to subsequent purchasers, see 2 Eq. Ca. Abr. 615, pt. 12; Sugden 506 to 509—538—539; Marshall v. Fisk, 6 Mass. 24; Peters v. Goodrich, 3 Con. 146; Johnson v. Staggs, 2 Johns. R. 510; Frost v. Beekman, 1 J. C. R. 298; Fisk v. Gordon et al. 10 Vt. R. 288; Cunningham et al. v. Buckingham, 1 Hammond (Ohio) R. 264.

But recording a deed in a wrong county, required by law to be recorded, is not constructive notice in law or equity, for neither requires one to look for it

SECTION III.

‖ A principle of adherence to the strict import of the phrases "intent to deceive" and "intent to defraud," which occur in these statutes, may seem to justify the opinion of some ancient lawyers, that only that person who could be considered as the object of the fraudulent intent, was qualified to treat the fraudulent conveyance as void. If a voluntary gift or conveyance be made with a manifest intention to effect a purpose which discovers no original design of defrauding those who come to take advantage of the statutes, they shall, according to this opinion, have no relief, although their particular interests may be consequentially affected. A similar principle of construction, before the making of those statutes of Elizabeth, which are our present concern, seemed to prevail in the decisions of the judges upon other statutes made in suppression of fraud; the resolution in ‖ *Warneford's* case determined in the third 47

claimed under and stood in the place and character of a volunteer as against the former lessee, who was a valuable purchaser of his lease, (it being at rack rent)‡ is not easy to see how the notice which the purchaser of the estate is represented to have had of this lease could have influenced the question. But it may be remarked that this circumstance of notice is often mentioned in the report of a case with an air of importance, when in point of effect, it is perfectly neutral.

‡ Vid. 2 Vern. 327.

in a wrong county. 12 Johns. R. 140; 2 Johns. Ca. 85; Leneve v. Leneve, Amb. 438; Taylor v. M'Donald, 2 Bib. 420; Heister's Lessee v. Fortner, 2 Binn. 40; Lyle v. Ducomb, 5 Binn. 585; 1 Munf. 38.

The registry of a subsequent deed, gives no priority over a former deed not registered, when the grantee, at the time of its execution, had notice of the first deed. Jackson v. Leek, 19 Wend. 339.

But the grantee must have notice at the time of its execution. Brackett et ux. v. Wait & Moulton, 6 Vt. R. 411; Corliss v. Corliss, 8 Vt. 373; 3 Vt. 255; Morrison et al. v. Stattuck et al. 1 D. C. R. 42.

Actual notice of an unregistered deed is sufficient to put a subsequent purchaser upon his guard. Lessee of Cunningham v. Buckingham, 1 Hammond, 264; 1 J. C. R. 301, 575; 2 do. 155, 161, 172, 479, 603.

The object of the registration acts is to protect subsequent purchasers. They have no effect to vitiate the conveyance between the grantor and grantee. James v. Gibbon, 9 Ves. jr. 407; 1 Deac. & Chit. 100.

Where a deed of the east half of a lot, is recorded as a deed of the west half, an after purchaser, who has no notice that the deed recorded is different from the original, will be protected. Sanger v. Craigue, 10 Vt. 555.

year of Elizabeth was founded upon it. That case was as follows: A man holding lands of the queen *in capite* by knight's service, made a feoffment of the same with a fraudulent intent to defeat an execution for damages in which he had been condemned in B. R. but the course he took was by annexing a condition to the feoffment, such as is within the letter of the statute 52 Hen. 3. c. 6. against fraudulent conveyances to defeat lords of their wardships, (which right of wardship is preserved or rather affirmed in the statute of wills (1), 32 Hen. 8. c. 1. together with other fruits of tenure, as to one third of the lands so alienated) and upon the feoffer's dying, the heir being within age, the question was whether the heir and the third part of the lands should be in ward. And in the court of wards it was resolved against the queen, upon the ground that the intent was to save the estate from the execution and not to defraud the queen, and so against her majesty there appeared no covin (2). The case of *Tyrer* and *Littleton*, cited in the case of the *Chancellor of Oxford* (3), was thus upon the the special verdict: Thomas
48 Tyrer was ||seised in fee of lands held of the manor of H. fealty, rent, suit of court, and the render of the best beast upon the death of every tenant in fee simple by way of heriot, and Thomas Tyrer being so seized, in consideration of an intended marriage between his son John and one Joyce Grove, enfeoffed the said John of the said lands to hold to him and his heirs. —John before his marriage by indenture demised the same lands to his father Thomas for a term of 40 years, if Thomas should so long live, and this he did *with intent* to deprive the wife of the benefit of her dower until the death of the father. The marriage took effect and afterwards Thomas died, living John the son, and whether a heriot was due to the lord upon his dying possessed only of the term of years, upon the ground that the feoffment and demise were fraudulent against the lord was the question. And because it was found by the special verdict, that the tent of the feoffment and demise was to deprive Joyce of the benefit of her dower, until the death of the father, it was
49 held that the transaction should not be extended by ||con-

(1) Vid. Bingham's case, 1 Rep. 63 b.
(2) Dyer, 192 b. 167 b.
(3) 10 Report 56.

struction to any other intent.* And the principle of *Warneford's* case abovementioned was relied upon, which decision it was said was applicable *a fortiori* to the case then before the court, because in *Warneford's* case there was such a fraudulent intent as would have avoided the conveyance as against creditors, had any such appeared to dispute its validity; but in *Tyrer* v. *Littleton*, the real intent was not fraudulent.

The complaint of the preamble of the statute, 13 Eliz. c. 5. is, that feoffments, grants, alienations, conveyances, &c. had been contrived, and devised of malice, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, and the enacting clause avoided such feoffments, &c. made with such intent, "only as against such person or persons whose actions, suits, debts, &c. were, should, or might be disturbed, hindered, delayed or defrauded."** This avoiding clause ||might seem, perhaps, by analogy of principle with 50

* A conveyance by a husband, shortly before his death, of all his property, real and personal, to his children, without a valuable consideration, and with an intent to defeat the wife of her dower and her share of his personal estate, securing at the same time the possession, use and control of it, during his life, is fraudulent, against the claims of the wife and will be set aside. Thayer v. Thayer et al. 14 Vt. R. 107; do. 185.

A creditor may maintain a trustee process against the vendee of property fraudulently purchased, to keep it from being attached; or where one disposes of all his property, to secure a future support through life, making no provisions for the payment of his debts, the sale as to his creditors is fraudulent and void. Crane v. Stickles & trustee, 15 Vt. R. 252; R. S. Vt. ch. 27. §34.

But a voluntary settlement in favor of wife and children, is not impeachable on that ground alone by subsequent creditors. Sexton v. Wheaton et ux. 8 Wheat. 229.

A secret conveyance of her property by a woman, immediately before her marriage, is a fraud upon the marital rights of the husband. C. C. U. S. P. Oct. 1821.

** Actual fraud in the conveyance of property, may be shown by a creditor, although his debt accrued subsequent to the conveyance sought to be avoided. Wardsworth v. Havens, 3 Wend. 411. And although the plaintiff have a mere right of action; as for a breach of promise of marriage. Lowry v. Pierson, 2 Bailey's R. 324; Hoke v. Henderson, 3 Dev. 12; O'Daniel v. Crawford, 4 Dev. 197; Iley v. Niswanger, 1 McCord's Ch. R. 521; Doyle v. Sleeper, 1 Dana's (Ky.) R. 532; Brown v. M'Donald, 1 Hill's Ch. 303.

the cases just cited, to be capable of a distributive construction with respect to the different classes of persons, whose interests or claims were the objects of the fraudulent intent. A clear intent to defraud a creditor, though it vacated the gift or conveyance as against all *creditors*, might not, in some opinions, let in any other rights than those of creditors; so as that persons, claiming by forfeiture, or entitled to heriots, penalties, or mortuaries, might be excluded from the benefit of the statute, in such a case.

It might have been considered perhaps also, that if a plain intent to defraud one particular description of persons were construed to vacate the conveyance, or other fraudulent act, as against all whose claims might be consequentially affected, the vindicatory justice of the statute would be too much stretched, and the repose of titles too easily disturbed. And it might have seemed, that as the voluntary conveyance may in fact be innocent, notwithstanding the statutory presumption arising from a subsequent act or attempt, the offensive matter, which consists *in the*
51 ||intent to deceive, ought only to vitiate the conveyance to the extent of the meditated fraud, and that the statute did not design that the partial dishonesty of the donor should carry to the voluntary alienee, consequences more ruinous than the subversion of the specific fraud, which was actually in projection.

But with how much reason so ever it may be contended, that a fraudulent gift or conveyance, *within the statute* 13 Eliz. with whatever intent made, is rendered void, by the *strong words of that act*, against *all* persons whose interests or claims are enumerated *therein*; yet this argument will not bear out the inference of fraudulent intent, as against a subsequent *purchaser*, from the circumstance of the seller's having been indebted at the time of the settlement or conveyance, or warrant the reasoning which ascribes to the fact of being indebted in such a case, any *confirmatory* indication of fraud, as against such subsequent purchaser. If the design of the person conveying, be to
52 defraud his creditors; any intention of fraud with respect ||to a purchaser, becomes by so much the less presumable; and though it may be true, that distressful circumstances are a general temptation to dishonesty, yet, the purview of the statute

looks only to a particular intent, and that intent is only discernable in the natural concert of motives and actions. The contrary reason confounds the operation and objects of the two statutes, and converts the evidence of intent under the one, into an evidence of intent under the other, where the two several intents have distinct and divergent aims *(a)*. But, in *Doe* v. *Routledge* (4), which was a case between a subsequent purchaser and a prior voluntary alienee, on the 27 Eliz. c. 4. the argument from the mouth of the venerable chief-justice adopted the inference, to which the above reasoning is opposed in the following remark, ascribed to him ||by the reporter, "one great 53 circumstance, which should always be attended to in these transactions, is, whether the person was indebted at the time he made the settlement; if he was, it is a strong badge of fraud."*

But it is not only in *Doe* v. *Routledge*, that the doctrine above considered has failed of confirmation; in the case of the *King* v. *Earl of Nottingham et al.* (5), it was forcibly impeached. To remove out of the way the solemn and well-considered opinion of the judges in *Warneford's* case, a difference was taken between cases, wherein the question of fraud was integrally before the judges, and such wherein the verdict of a jury had found an actual fraud, but contrived for another purpose and against another person, than the purpose imputed, and the person complaining. *Warneford's* case was, indeed, as was observed by the court, in *Tyrer* v. *Littleton*, above cited, particularly strong, since, as the real intent was in itself fraudulent, it seemed to be within the reason on which the

(a) In Beverly v. Gatacre, 1 Roll. Rep. 305. which was the case of a settlement, and subsequent conveyance for valuable consideration, it is true that great stress was laid by the judges upon the question, whether the settlor was indebted or not, at the time of the settlement; but it is to be observed, that the *purchaser*, in this case, was virtually a *creditor*, and took the conveyance as a security for his debt.

(4) Cowp. 711. (5) Lane 47.

* It is held in Doe d. Otly v. Manning, 9 East. 59, that a voluntary conveyance will be set aside, as fraudulent, in favor of a subsequent purchaser for the value, though the latter have notice of the first deed. But this doctrine has been shaken, if not overruled, Buckle v. Mitchell, 8 Ves. 110; Hudnel v. Wilder, 4 M'Cord's R. 294; see also Sterry v. Ardin, 1 J. Ch. R. 264; Ricker v. How, 14 Mass. 139. But see Smith v. Lowell, 6 N. H. 67, and cases there cited by Richardson, Ch. J.

decisions in Doctor *Ellis's* (6) and *Saunder's* case (7), in Plowden's Commentaries were founded. The *Earl of Nottingham's*‖ case (8) in which this reasoning, from the criminal law occurs, was as follows: "Sir Robert Dudley intending to travel beyond the seas, by indenture for valuable consideration expressed, but none paid (9), conveyed the manor of Killingworth, among other lands, to the Earl of Nottingham, in fee, and in the deed there was a proviso, that, upon the tender of an angel of gold, all should be void; and covenants were added, on the part of the bargainees, that they should make all such estates as Sir Robert Dudley appointed; after which, Sir Robert Dudley, by licence from the King, went to Venice. The bargainees afterwards, made a lease to Sir Robert Lee, to the intent, that the Lady Dudley should take the profits of part, for ten years, if the estate of the bargainees should continue so long unrevoked.—Upon the King's having notice of some mal-practices of Sir Robert committed on his travels, commanded him, by privy seal, to return, upon pain of forfeiture of *all his* lands, and afterwards upon his non-compliance, a commission issued to inquire what lands and tenements, &c. Sir Robert
54 Dudley had, or others upon trust for him, or ‖to his use, and the jury found the facts specially, but no fraud expressly; whereupon the King exhibited his bill, in the exchequer, against the bargainees, and Sir Robert Lee, their lessee, who made a true discovery of all these facts; and it having been contended by the counsel for the defendant, that no fraud could be here imputed, since it could not be supposed that when the Earl applied for a licence to travel, he foresaw a countermand of his licence, or intended to commit a contempt by his refusal to return, and so to save his lands by the conveyance of them to another: and *Warneford's* case having been cited to shew that even where a special verdict had found actual fraud, but with a different object from that which was imputed, the sufferer by the fraud, against whom no injury was intended, could not avoid the fraudulent act; it was answered by the King's counsel that "the contempt subsequent, was sufficient proof of the precedent

(6) Plowd. Com. 100. matters of the crown, happening at Salop.
(7) Plowd. Com. 473. the Queen v. Saunders & Archer.
(8) Lane 44. (9) 1 Keb. 770.

conjecture; that the conveyance was fraudulently made, to prevent the prejudice which might accrue by such contempt, and that the judges ought to make such ‖construction upon 56 the subsequent act." The beforementioned cases were cited from Plowden, to shew that the judges considered the first intent as proved by subsequent and secondary actions; and that, therefore, where, in *Saunders'* case, the party, having an express intent to poison his wife, delivered to her a poisoned apple, which she not knowing it to be poisoned, gave to her child, who died in consequence of eating it, the indictment stated, that the said Saunders, of malice aforethought, &c. *intended* to murder the said *child*. So also, in the other case, cited from Plowden, where it was proved that the murderer intended to kill A. but that B. interposing in the affray, was slain accidentally; there, though, in truth, there was no primary intention to kill B. yet such intention was imputed by legal collection. It was considered that there was *intentio legalis*, though not *actualis*.

The doctrine of those cases, so ably reported by Plowden, is existing law; but the propriety of the application of it, to questions of fraudulent intent, upon ‖these statutes of Eli- 57 zabeth, may perhaps be subject to doubt. The finding by the special verdict of the jury in *Warneford's* case, of an intent, different from that which was charged, seems clearly to have prevented the application of the above stated rule, of criminal construction, to the circumstances of that case. Yet it is not to be supposed, that the jury found a verdict against the direction of the court, which, if it had recognized the said principle, as applicable to the case before them, would have directed a verdict in favor of the queen. In the case above mentioned of *Tyrer* v. *Littleton*, the *redemise* was not made with an *unlawful* intent, and the real intent being found by the jury, the court could not *presume* fraud against the verdict. The *arguments* in that case, however, go the whole length of *Warneford's* case, which seems to have established the rule, that, where a particular intent *is found by a jury*, though that intent be unlawful and fraudulent, yet, if a different intent is the ground of the charge, and a person not intended to be injured, makes application for relief, the fraudulent conveyance shall not be avoided. The effect of the finding of a jury, as in *Warneford's*

‖case, is admitted in the case of the *Earl of Nottingham;* but it seems to have been there the prevailing opinion, that if proof appears of a fraud under the statute meditated against one, who does not come to complain, yet, that any person consequentially injured thereby, in respect of any right or interest *expressly guarded by the statute,* may apply the fraudulent intent (10) to himself, and that courts and juries ought to regard the subsequent matter as attracting, in legal consideration, the maglignity of the primary intention, and consummating the incipient fraud.—So far, perhaps, the doctrine is upheld by the strong and general language of the statute 13 Eliz. which seems to justify the observation of Sir William Jones (11), that if a man makes a fraudulent gift, to defraud a creditor solely, it is void against all those who are within the statute 13 Eliz. But it seems to be too great an extension of this doctrine, when it is admitted to confound the presumptive evidence of intent in the construction of these two several statutes of Elizabeth. And it is clear, that if the rule above adverted to, as borrowed from the criminal *law,*

59 ‖be admitted in the interpretation of these statutes, it will warrant the legal deduction of intent under one, from the actual evidence of intent under the other. But, it should seem, that as these statutes were made for the protection of subsequent interests, and are, in that view, introductive of new laws, and since they have been considered by the most judicious expositors as effecting their object, by new and special rules of presumptive evidence, it might be unsafe to apply to them any species of testimony, or principle of construction, not practically involved in the exigency of their operation. Upon the whole, therefore, it seems that though the circumstance of a man's being indebted, before making a voluntary conveyance or settlement, may be admitted as evidence, where the person contesting it is within the statute 13 Eliz. yet, notwithstanding the *dictum* in *Doe v. Routledge,* the proof of such a fact ought rather to prejudice than advance the claims of a *purchaser.*

With respect to which case of *Doe* v. *Routledge,* we may

60 be permitted generally to remark, that besides ‖an intimation of doubt, as to the grounds and propriety of the

(10) The intent to deceive is not traversable. Sid. 96. (11) Palm. 415.

decisions which have ruled notice to be inoperative in these cases, and the importance which it has endeavored to attach to the question, whether the person conveying be indebted or not at the time of his conveyance, in cases where the claim is made by subsequent purchaser, it contains some liberal notions on these statutes of Elizabeth which it is hoped will not propagate the spirit of emancipation among others, on whom the authority and science of our ancestors make but too weak an impression.

SECTION IV.

||These preliminary topics prepare us for the investigation 61
of the question, whether fraudulent or not fraudulent, as such question is affected by the existence or non-existence of a valuable consideration within the purview of the statutes above-mentioned. Whoever reads these statutes of Elizabeth will find little or no reason for the law they promulge, unless he sees in the context of each of them the design of casting upon unpurchased gifts and conveyances, at least a *presumption* of fraud, and the burthen of their own vindication. Venerable authorities have adjudged the want of apparent valuable consideration to furnish only a presumption of the fraud intended by parliament, while great names have not been wanting to sanction the doctrine that at least in cases falling within the ||statute *(a)* 62
27th Eliz. the voluntariness of conveyance is meant by the statute to be identified with fraud; and that the want of such

(a) In some of the instances already produced the courts have shewn a disposition to give a stronger effect to the 27th Eliz. in favor of purchasers, than to the 13th Eliz. in favor of creditors; as a reason for which Lord Hardwicke, in Russell v. Hammond, 1 Atk. 15. observes that in the cases under the 27th Eliz. a man has actually paid money for the estate. See also the distinction taken by Lord Hardwicke in Townsend v. Windham, 2 Ves. 10. and see 3 Atk. 412. But in the Treat. of Eq. 1 vol. 268. last Edit. it is said by the author, that voluntary conveyances are void by the express letter of the statute 27th Eliz. and see 2 Vern. 327. Shaw et al. v. L. Standish; a distinction, however, which ought to be cautiously admitted, and can only be maintained to a limited extent; for the proviso in the 13th Eliz. which explains the purview of the act, excepts only estates conveyed upon *good* consideration, and *bona fide*.

consideration as that statute regards necessarily vacates the conveyance for the benefit of those within the relief of the statute. These notions, which apparently contradict each other, are perhaps not so irreconcilable as they appear at first; and though they have kept the question long vibrating between two
63 opposite attractions, are capable of being ||approximated by an attentive comparison of their principles.

Although it be admitted, in conformity with the more rigorous opinion, that a conveyance plainly voluntary, coupled with a subsequent endeavor to sell, is conclusive evidence of fraud as against the purchaser, and must be so explained to, and found by a jury: yet the question is still open as to what shall be considered *voluntary* in the full and obnoxious sense which the context of that statute imports. We may remark, without straining after subtleties, that the word *voluntary* has many shades. There are many degrees between conveyances so absolutely voluntary as to be without any interchange, condition, equivalent, or mutuality of interest to support them, and conveyances in which the actual consideration of money, or trafficable price, is only wanting. An apparent want of consideration for the transfer of an estate may, it is true, upon the most reasonable construction of the statute, raise a presumption of fraud; but we may, perhaps, without hostility to either of the con-
64 tending opinions above ||stated, observe, that this presumption of fraud, arising from the want of the actual consideration of price, may be repelled by many obvious inducements of interest in the parties, which, though falling short of a balanced equivalency, may yet take the case out of the statutes. A reconciling medium may perhaps be discovered, at least in a great majority of instances, (which is all that can be hoped for on controverted legal points) between apparently discordant determinations on this subject. When authorities occur, in which the rule is rigorously laid down concerning the effect of the voluntariness of a conveyance or settlement, we shall seldom violate the principle of the case by contracting the import of the word to the total want of all subject of stipulation or condition between the parties, and, where presumptive evidence only is allowed to the voluntariness of a conveyance, by enlarging its sense so as to embrace within it all such cases as are marked only by the mere

want of such ostensible considerations as move the parties to a regular contract.* The ||diversity of doctrine on this 65 subject seems partly owing to the ambiguous and unsettled meaning of the word *voluntary*, and the controversy has perhaps sometimes existed without a radical difference of opinion. It may be found, that in many cases wherein there appears an opposition of principle, there is in truth only a difference in the scope and boundary ascribed to a single term.

Till the word *voluntary* has a more settled meaning in our law, a more sparing use of it than is generally made might be better for the elucidation of the present subject. It has not been adopted by the statute, and therefore has no technical propriety on that ground to recommend it. Delivered from its verbal ambiguity, the subject will be best considered by attentively regarding the reasons on which the reported decisions may be maintained by the facts and circumstances belonging to the whole of each case, without too implicitly attending to the literal expression, or always ||bounding our views to the professed 66 ground of the judgment. His will be a fortunate case, whose investigations will furnish him with a certain criterion on this fluctuating subject. These observations aspire only to show that, as a general rule resulting from a comparison of the different cases in the books, from which any clear grounds of decision can be extracted, it may be concluded, that a presumption of fraud properly arises upon the statute 27th Eliz. cap. 4. wherever a conveyance is made without a plain consideration of value; which presumption may be repelled by shewing, that the transaction or treaty on which the conveyance was founded, virtually contained some conventional stipulations, some compromise of interests or reciprocity of benefits, that point out an object and motive beyond the indulgence of affection or claims of kindred, and not reconcilable with the supposition of intent to deceive a purchaser. But that where no reciprocation of benefit, no substantial interchange, compromise, or condition, can be made to appear, and the case shews on one side a perfect blank, or

* There are two things, and but two, essential to enable an after purchaser to avoid a prior conveyance. 1st, the grantor, in the first conveyance, must intend fraud; 2d. the after purchase must be fair and for a just price.

where no ||inducement appears but the suspicious attraction of proximity of relationship, such a conveyance, coupled with a subsequent negotiation for sale, is evidence conclusive of the statutory fraud, and imperative upon courts and juries.*

Without some principle of steady direction the progress through the apparent contradictions in the cases upon this question is wearisome; and the search is increased in difficulty by a disagreement in the sentiments expressed at different times by the same judges. In the before-mentioned case of *Townsend* v. *Windham* (1) we find the following observation of Lord Hardwicke upon the statute 27th Eliz. c. 4. "Every voluntary conveyance made, where afterwards there is a subsequent conveyance for valuable consideration, though there be no fraud in that voluntary conveyance, and the person making it be not at all indebted, yet the determinations say that such mere voluntary conveyance is void at law by the subsequent purchase for
68 ||valuable consideration."(*b*)** But in the case before cited of *Russel* v. *Hammond* (2), his Lordship shewed himself to be aware of the judicial opinions in the cases of *Sir Ralph Bovey* (3) and *Lord Tenham Mullins* (4), and subscribes to the doctrines of those cases and others which will be hereafter noticed. The

(*b*) In the case of White v. Sansom, 4 Atk. 412. Lord Hardwicke observed, that he had hardly known an instance where a voluntary conveyance had not been held fraudulent against a subsequent purchaser; and see his Lordship's opinion in Bennett v. Musgrove, 2 Ves. 57. to the same effect as to the construction of fraudulent conveyances in a court of law.

(1) 2 Ves. 10. (2) 1 Atk. 15. (3) 1 Vent. 193. (4) 1 Mod. 119.

* It is clearly settled, that a voluntary settlement in favor even of strangers, by one not indebted at the time, and meaning no fraud, is good against subsequent creditors. Stephens v. Olive, 2 Br. Ch. R. 90; Lush v. Wilkinson, 5 Ves. 384; 12 Ves. 155; Halloway v. Millard, 1 Mad. 414; Battersbee v. Farrington, 1 Swanst. 106; E. I. Co. v. Clavell, Gilb. Eq. R. 37; Les. of Ridgeway v. Underwood C. C. U. S. N. J. Oct. 1821; Gilmore v. N. A. Land Co., 1 P. C. C. R. 460; Jackson v. Seward, 5 Cow. 67.

A deed fraudulent as to creditors, cannot be avoided by a creditor, the consideration of whose claim is illegal. Alexander v. Gould, 1 Mass. 165.

** Moore 602, 615; Gore v. Brazier, 3 Mass. 541; Inhabitants of Worcester v. Eaton, 11 do. 368; Hills v. Elliott, 12 do. 26; Dexter v. Harris, 2 Mason, 531; Bean v Smith, 2 do. 252; Cathcart v. Robinson, 5 Pet. R. 264; Doe d. Tunstill v. Bottcrill, 2 N. & M. 64.

decision in *White* v. *Hussey* (5) agrees with the above opinion of Lord Hardwicke, cited from the case of *Townsend* v. *Windham;* the commisioners, all agreed, that they might decree a conveyance to be fraudulent merely for being voluntary, and that without any trial at law.

Again, in the case of *Gardiner* v. *Painter* (6) it was said, that it can never be a question, whether a ||*voluntary* settle- 69 ment be good against a purchaser. In favor of this construction the case of *Hungerford* v. *Earl* is frequently mentioned in the books (7); and it is further countenanced by the opinion of the court pronounced by Ch. J. De Grey in the case of *Goodright* v. *Moses* (8). We may observe too, that the learning of Lord Hardwicke (9) and Lord Mansfield (10) drew from them respectively an admission, that the authorities had greatly inclined to the doctrine of the foregoing cases.

These cases, however, are balanced by others expressed in very different language. A contrary doctrine is by some thought to be insinuated in *Fitz-James* v. *Moys* (11), where it was held that the first conveyance, which was purely voluntary, *might* be fraudulent. The case of *Jenkins* v. *Kemys* (12) contains an opinion of Lord Hale, that a voluntary settlement was only to be taken as presumptively fraudulent against a subsequent || purchaser. In *Sir Ralph Bovey's* case (13), the effect 70 of the voluntariness of a conveyance in the opinion of the same judge was confined to presumptive evidence. In *Douglas* v. *Ward* (14) we have also the authority of the court for the same doctrine on voluntary conveyances. It was admitted in *Holford* v. *Holford* (15), that a voluntary conveyance was *prima facie* fraudulent against a conveyance for consideration. Again, in *Lavender* v. *Blackstone* (16), Lord Hale maintained the admissibility of circumstances to explain the motives of a voluntary conveyance, and to repel the presumption of fraud, which

(5) Prec. in Can. 13. (6) Sel. C. in Temp. Ld. King. 69.
(7) 2 Vern. 261. (8) 2 Black. 1019.
(9) 2 Ves. 10. (10) Cowp. (11) 1 Sid. 133.
(12) 1 Lev. 150 237. (13) 1 Vent. 293.
(14) 1 Ch. Cas. 99. (15) 1 Ch. Cas. 216.
(16) 2 Lev. 146. The sense requires the word *voluntary* to be supplied in the opinion pronounced by Lord Hale in this case.

he allowed the voluntariness of a conveyance to import *(d)*.
71 The cases of ‖*White* v. *Stringer* (17), *Lord Tenham* v. *Mullins* (18), *Garth* v. *Mois* (19), and *Sagittary* v. *Hyde* (20), all lean to the same doctrine.

If we drop for some time the word *voluntary*, and thus relieve the question from verbal embarrassment and dubiety, we shall see perhaps in the matter of the greater number of the cases decided a true but tremulous line of discrimination, which, though often vibrating with the unsteadiness of language, preserves a tolerably consistent course through the principles and reasonings maintained by the courts. A preponderancy of cases, numerous and authoritative enough to create a prevailing rule, where universality cannot be obtained or expected, may appear perhaps to have established the necessity of some stipulation or condition, some express or virtual contract, or something in the nature or spirit of a contract, operating either immediately upon a conveyance or limitation, or primarily upon the deed or instrument containing it, to render it safe and effectual as against a subsequent sale. Whether these ingredients have their ef-
72 fect, by proving the ‖conveyance not *voluntary* in the more restricted sense given to that word, or not fraudulent, where the term *voluntary* is taken in its greatest latitude, as comprehending all cases wherein the plain characters of a sale and purchase, or the consideration of marriage, do not appear, is of small importance. In either supposition, the want of a real visible consideration will produce similar consequences—the thing is perhaps the same in effect and substance. Whether the question arises in a court of Equity or Law, neither of these judicatures will be diverted by a word of such variable import, not occurring in the statute itself, from applying the provisions of the act to the particular case before them, with a true intelligence of its scope and purview, and upon those legal and conservatory

(d) The vague and flexible sense given in the cases to the word *voluntary* will be observed by the diligent reader; and it is worthy of remark, that Lord Hale, who, in the cases quoted in the text, so clearly maintains the voluntariness of a conveyance to be presumptive evidence only of fraud, in Sir Anthony Bateman's case, 1 Mod. 76. seems by his use of the word *voluntary* to suppose in it a necessary implication of fraud under the statute.

(17) 2 Lev. 105. (18) 1 Mod. 119. (19) 1 Keb. 486. (20) 2 Vern. 44.

principles of construction which agree with the nature and necessity of fixed and general laws.

It may safely be affirmed, that in a court of common law, whether the question be produced upon a ‖demurrer or 73 special verdict *(e)*, or receive its ultimate determination from a jury, (for the cases seem to shew that it may be for the decision of either branch of judicature, according to the shape in which it arises, and the points of inquiry it involves,) the *total* want of consideration as against a subsequent purchaser, has in general been regarded as a conclusive argument of fraud.

SECTION V.

‖ What *degree* or *description* of *inducement* is a *con-* 74 *sideration* sufficient to support a settlement against a subsequent sale, is a point here to be inquired into. It seems hardly necessary to add a caution against confounding the consideration, which is requisite under the statute 27 Eliz. with that sort of consideration which is necessary to raise an use, but yet some-

(e) In Butler v. Waterhouse, 2 Show. 46. the case came before the court upon a special verdict, finding the deed of settlement with a power of revocation; and it was made a question, whether the court could judge of fraud under the statute 27th Eliz. c. 4. and to shew that they could, Standen v. Bullock was cited, 3 Co. 82. Brownl. 190. Bridgeman 23. In Saper v. Jakes, 2 Brownl. 188. the defendant pleaded not guilty to an action of trover, and gave in evidence an assignment of a term to him with power of revocation, and the court directed the jury that this was fraudulent within the 27th Eliz. And it was said by Harris Serjt. and not denied by the court, in Tyrer v. Littleton, 2 Brownl. 188. that where the court may direct the jury to find fraud, there they may judge, upon the special matter found by verdict, whether fraudulent or not. Ld. Coke's opinion in that case, turned upon the jury's having found a different intent from the intent charged; and the other judges admitted that a *power of revocation* was fraud apparent, and needed not to be averred. *Sed. Qu.* as to the distinction. In Burrel's case, 6 Rep. 72. the court directed the jury to find fraud. Cross v. Faustenditch, Cro. Jac. 180. and Roe v. Mitton, 2 Wils. 356. were upon special verdict, and no doubt as to the point of jurisdiction. This power of the court, however, was negatived by the Bench in the Earl of Nottingham's case, Lane 48.

thing, by way of clearing the ground, may not be altogether without utility.* In the cases of (1) *Watts* v. *Bullas*, and (2) *Osgood* v. *Strode*, wherein the assistance of the court of chancery was prayed in behalf of volunteers, related by blood to the grantor, and it was argued, that, there being such a consideration, as, upon a covenant to stand seised, would have raised an use, the court had a good analogous foundation for affording relief, upon the ground that uses before the statute 27 H. 8. were trusts, and that a trust ought now to be raised, by what-
75 ever ‖before the statute would have raised an use. The weight or success of this argument does not appear by the report of either of those cases; but some time afterwards, in (3) *Goring* v. *Nash*, "it was observed by Lord Hardwicke, that Lord Keeper Wright reasoned too largely upon this point, in *Watts* v. *Bullas*, owing to his being new in that court, and pursuing the maxims of law too far, and that a court of equity did not regard the consideration to raise an use." But if this analogy could prevail in equity among volunteers, the statutes of fraudulent conveyances have certainly destroyed its applicability to cases wherein parties claim upon considerations of value.

Even the valuable consideration necessary to a bargain and sale may, nevertheless, be no valuable consideration under

(1) 1 P. Wms. 60. (2) 2 P. Wms. 254. (3) Atk. 189.

* A mother giving up an annuity issuing out of the whole estate, for a like annuity arising out of part only, which was clearly sufficient to pay it, on her eldest son's marriage, is a sufficient consideration to prevent the limitation in the settlement to his brothers, in default of issue of himself from being fraudulent against a subsequent purchaser. Hamerton v. Milton, B. N. P. 261.

A limitation in a marriage settlement in favor of a stranger, is held not within the consideration of marriage, and is consequently voluntary and void against a subsequent purchaser for a valuable consideration, and it matters not that the purchaser has notice. Sutton v. Chitwynd, 3 Merv. R. 254; and a limitation in favor of the settlor's brothers is also void as against a subsequent purchaser. Johnson v. Legard, 3 Madd. 283; 6 M. & S. 67.

A father makes a deed to three infant children in consideration of natural love and affection, upon condition that they are to remain in his possession during life; at the time he was indebted in two bonds upon which judgments are afterwards obtained and executions returned satisfied. He subsequently incurs other liabilities; held that these facts do not constitute fraud *per se*. And so far as the fraud is a matter of fact, the jury not having found it, it cannot be inferred. Chatterton v. Gardner, 11 Leigh. 281; Seaton v. Wheaton et ux. 8 Wheat. 229.

the statute, 27 Eliz. *(a)*. The badges of || fraud under that statute may accompany it, without rescinding its effect of raising the use; a secret power of revocation, upon a colorable condition, would not, it is apprehended, root up such use *ab initio*, without the strong inference of this act of Eliz. in favor of honest purchasers. The consideration to raise an use upon a covenant to stand seised, affords no protection to the use when raised; and though such a consideration may accidentally become evidence to repel a charge of fraud in certain cases, yet its special and characteristic agency or virtue, exhausts itself in giving birth to the use.—With respect to the use arising upon a feoffment, a mere nominal price, and the acknowledgment expressed in the deed, without any actual receipt, is sufficient. (4)

These conveyances have their different degrees, and some their distinct sorts of consideration; but the consideration necessary, under the statute 27 Eliz. to maintain the validity of a conveyance, as against a ||subsequent purchaser, is of equal 77
exigency in *all* conveyances, and, therefore, cannot be the same with that distinct essential consideration of any one, from which is derived its characteristic operation. Thus the valuable consideration of the bargain and sale, will carry the use to strangers (5), while the valuable consideration under this statute, stops short of those limitations to which it has not a visible and clear applicability. Cases of settlements may be shewn, it is true, wherein relationship by blood has been admitted to support, against subsequent purchasers, collateral and remote limitations out of the path of the direct matrimonial consideration; but it is apprehended, that an attentive examiner of these cases, will, in the main, discover that parents or collateral relations have been induced to become parties to these settlements, with motives

(a) The consideration under the statute 27 Eliz. is here separately adverted to, because it is the most obviously distinguishable from the considerations to raise uses. Family settlements and advancements to children, it has been already shewn, are good considerations as against creditors under the 13 Eliz. where the settlor is not indebted at the time.

(4) Wilkes v. Leuson, Dyer, fo. 169. a. p. 22. See Valiant's Edit. and see Doct. & Stud. 97, et seq.

(5) Vid. 2 Roll. Abr. 784. pl. 7.

capable of being explained and evidenced by their connexion in blood with these *ulterior* objects, whose benefit or provision may reasonably be supposed to have been made by them the
78 subject of stipulation, ‖in the general compromise or adjustment of interest, which often takes place on a marriage settlement.

It may not be improper here to call the reader's attention to the case of *Cross* v. *Faustenditch* (6), which is an instance of a partial avoidance of his own settlement, by the settlor himself, while intending to act, by virtue of a power contained in the same; and the case exemplifies, as well the extent and limit of the consideration of blood and affection, in raising an use, as the mode in which the statute 27 Eliz. operates. The case was thus in effect: A. by a covenant to stand seised to uses, made a voluntary conveyance, within the statute 27 Eliz. with a power of revocation *(b)*, and thereby limited an use to himself for life, with a power of leasing for twenty-one years. Afterwards,
79 in consideration ‖of a fine paid, A. made a lease for twenty-one years, and the principal question was, whether the lease made, was a lease supported by the power of Leasing, or took effect in avoidance of the settlement, as far as the term extended. And, although it was urged, that if it could not have its operation, by virtue of the leasing power, it yet might take effect out of the settlor's life interest, which might endure beyond it; yet it was resolved, that the lessor was as tenant in fee, when he made the lease, *quoad the lease*, for the lease might extend beyond the life, and was unsupported by the power. And as the settlement was without consideration, it was *revoked*, i. e. *avoided*, as to the lease which was supported by a consideration of value. It could not take effect by the power, because the power, which was only an use, could not rise upon the covenant to stand seised, for the lessees were strangers to the considera-

(6) Cro. Jac. 180.

(*b*) The revocation afterwards spoken of, as made by the lease in this case, could not be intended a revocation by virtue of this power, for the lease must have taken effect, by *avoiding pro tanto* the settlement, and every clause contained in it; and the power of revocation could not at once be the fraudulent act, and the means by which the fraudulent act was defeated.

tion of blood, and therefore could take no benefit of such an estate *(c)*.

‖There are cases which have a tendency to melt down 80 the particular provisions of these acts of Elizabeth, into an identity of effect, with the inherent remedial efficacy against fraud, residing in the common law of England. And the principle of reasoning on which this idea is bottomed seems to be, that where good solid and prudential inducements may naturally have dictated the settlement or conveyance, the sensible construction of the statutes of Eliz. against fraud will not invalidate its operation. But while such positions may wear the appearance of liberality of thought, and attract by the simplicity of their theory the general student, they leave the professional inquirer without any practical rule to direct him. Our judgment must still be decided by some settled criteria, and ‖these 81 criteria cannot be settled with any approach to certainty, unless the least fallible tests are sifted from the more ambiguous, and collected and classed into rules with something like the constancy of science. There is scarcely an instance of a settlement made after marriage where much may not be said on the score of prudential and honorable motives. If a married man have made no provision for his wife and the mother of his family, but what is subject to the arbitrary motions of his own mind, or the fluctuations of his fortune, there is surely a strong ground for supposing him to be honorable and sincere in his apparent anxiety to secure, by an irrevocable instrument, such a provision for her and his family as may survive his own failures, losses, or caprice. Yet the determination in *Douglas* v. *Ward (7,)* *Colville* v. *Parker (8,)* and *Goodright* v. *Moses (9,)* are, it is apprehended, the law of the present hour. If the designs of fraud are in the old proverbial language hatched *in cava arbore et opaca*, we may observe, that it makes choice of a tree, the depth of

(c) The case, however, it is conceived, might have carried the doctrine a step further; for it would have availed nothing, if the lessees had actually been privies in blood, since the power was void in its creations by reason of the uncertainty of the person to be benefited thereby; and so it was resolved in Mildmay's case, 1 Rep. 176 b. For the rule of law is, that a good *execution* will not avail, where the *constitution* is defective. Hob. 151

(7) 1 Chan. Ca. 99. (8) Cro. Jac. 158. (9) 2 Blac. 1019.

whose umbrage, while it favors concealment, || gratifies the eye of the spectator. Colorable pretexts and appearances are never wanting to the skilful artificer, but ambiguous morality must not disarm the vigilance of the law. If we look narrowly into the case of *Doe* v. *Routledge*, we may perceive, that some of the cases adverted to by Ld. Mansfield in support of his opinion, accord with that description or class of settlements which in *Roe* v. *Mitton* (10) are with great authority and appearance of reason denied to be voluntary. The two cases, perhaps, fundamentally agree in their conception of the thing, but they differ in the sense in which *voluntary* is to be understood, which covers a much wider area in *Doe* v. *Routledge* than is assigned to it by the case of *Roe* v. *Mitton*. We shall find indeed in general that the cases and authorities in the books will be at eternal hostility, unless we allow for the varying degrees of dilatation and contraction in the import of this term. It was further observed by his lordship in the same case of *Doe* v. *Routledge*, as a
83 reason for considering such settlements, as he had just ||before alluded to, as out of the statute, "that they are good at the time of making them." But with great veneration for the authority of that judge it may be remarked, that a settlement may be *good* with respect to this statute 27th Eliz. at the time of making it (if by *good* be meant valid) against the settlor and his representatives, and against all existing claims whatsoever, and yet *bad* as against a person afterwards coming in upon valuable consideration. If by *good* be meant *honest*, we cannot but see that, whether the transaction be honest or otherwise, is the very question itself upon the statute, which, when an estate, having before been the subject of a voluntary donation, is offered to sale, does not construe a subsequent act so as to make *that* fraudulent by matter *ex post facto*, which was not fraudulent at first, but views these two acts as integral parts of *one* contrivance, and as compound evidence of fraud from the beginning.

(10) 2 Wils. 356.

SECTION VI.

‖ It may be useful to the principal subject, to say something, here, upon the *consideration* to raise *uses* and *assumpsits*, not so much by way of furnishing analogies, as of pointing out distinctions. *

The origin of uses is in much obscurity. Many writers agree in deducing it from the civil law, which has always entertained a distinction between the possession and the usufructuary enjoyment; and they agree in ascribing to the clergy the introduction of them among us, with the view of evading the statutes of mortmain, which statutes those expounders of the civil law considered as not binding in conscience, and as being subject, in favor of their own order, to the equitable affirmance of secret uses in opposition to their spirit and intention (1). In debating the 22d question, however, in the 2d dialogue of the *Doctor and Student*, the Divine did not carry the common law‖ uses 85 up to the fountain of Roman jurisprudence; and the Student seemed to think that the distinction between the legal ownership and the usufructuary interest or right to the profits, was coeval, in our law, with the acquisition of property. But it seems to be of greater importance to ascertain the requisites to the validity of these uses than the period of the adoption.

It was said by Lord Bacon, in his reading on the statute of uses, that there is no reason in the law why a deed should not

(1) 2 Black. Com. 271. 2 Leon. 14. Lord Raym. 291.

* New. on Con. 393, 398; 3 Co. 83; Brown v. Jones, 1 Atk. 188; 2 Eq. Ca. Abr. 677 to 689; Pledger v. Davis' admr., 4 Desaus. Ch. R. 264; Cro. Jac. 158; Pr. Ch. 13; 1 Atk. 264; 2 Ves. 10; Sid. 133; 1 Ch. Ca. 216; 5 Co. 60, 61; 1 Eq. Ca. Abr. 334; 2 Bro. C. C. 148; Oxley v. Lee, 2 Desaus. Ch. R. 269; 1 Ch. R. 275; 2 Lev. 105; 1 Atk. 266; 1 Mod. R. 119, and cases there cited; 3 3 Lev. 387; 9 Johns. R. 450; 3 Johns. Ch. R. 550; 9 Cow. R. 437; 1 do. 622; 10 Johns. R. 456; 11 do. 337; 20 do. 85; 16 do. 515; Bacon v. Taylor, Kirby's R. 368, 369, 370; Chamberlin et al. v. Thompson, 5 Conn. (2d S.) 243; French v. French, 3 N. H. 234; 15 Vt. R. 525; 2 Roll. Abr. 788 to 791; Bacon on Uses 151, 311; Gilbert on Trusts 114; Cro. Eliz. 895; 2 Co. 52; 1 Leon. 197; Goodright v. Wells, Doug. R. 744; Jones v. Morley, 1 Lord Raym. R. 291; 2 do. 876; Crabbe's H. E. L. ch. 26; Powell and Sugden; Jac. L. D. title Uses; 2 Bl. Com. 332 to 342.

raise an use without any consideration; but he added, that there is a reason in chancery because no court of conscience will inforce *donum gratuitum* (2).* But whether an use were well raised, became a proper question in courts of law, after the statute of uses; for, unless the consideration would have raised the use in chancery before the statute, there would be no use *in esse* for the statute to transfer into possession. In cases wherein the possession was not transmuted by matter of record, or
86 solemn livery of seisin, the law looked || still to the consideration, and though a covenant executory imported in itself a consideration, so as to sustain an action for damages, yet it had not power to transfer a present interest in land without the consideration of blood working together with its instrumental efficacy. A fine and recovery, which are judicial transactions upon record, have the same power, as a feoffment, to raise an use without any actual consideration moving between the parties.** By these authentic modes of conveyance the estate in the land is passed instantaneously, together with the use, which remains in the feoffee, conusee, or recoverer, unless for want of consideration expressed or implied, it results back to the person from whom it removed. By these acts of notoriety and solemnity the usufructuary possession is transferred without actual consideration; and for this reason the uses, when declared upon these modes of alienation, (and they may be declared without expressing any consideration at all) (3), are said to arise out
87 of the conveyances or assurances themselves. But upon ||the bargain and sale, and covenant to stand seised, the use arises purely out of the consideration. Thus if A. covenants in consideration of the marriage of his daughter with the son of B. to levy a fine to the use of the daughter and son, and the fine is levied accordingly, though the marriage should not take effect, the uses of the fine will arise. But if A. instead of levying a fine, had covenanted to stand seised to uses, the result would have been different; for if that which was the consideration do

(2) 2 Read. on Stat. of Uses, 310, et seq.

(3) 1 Lord. Raym. 290.

* Bacon on Uses 310.

** 12 Mod. 161, 162; Mildmay's case, 1 Co. 176; Cro. Eliz. 374; Plowd. 307-8-9; Strange 17.

not happen, there is nothing to raise the use on such covenant to stand seised (4).* After a feoffment is made, the feoffer has only to guide the equity or use of the estate *(d)*. But in the bargain and sale or covenant to stand seised, an use is to be *raised* and *originated*, and not *merely directed*. And this seems to be the most satisfactory reason for the peculiar stress laid upon the consideration in such imperfect conveyances.

‖ The consideration of the bargain and sale rests wholly 88
on the contract, and as the bargain and sale of goods and chattels will have no binding effect, so as to raise an action at law without valuable consideration given, so neither before nor since the stat. 27 H. 8 c. 10. of *Uses*, or 27 H. 8. c. 16. of *Inrolments*, will it raise an use of land, unless it be grounded on an actual recompense. And as a bargain and sale of chattels *(e)* may, at this day, if for valuable consideration be good, without deed or writing, so, before the statute of inrolments, a bargain and sale of lands, according to Lord Coke, was good by parol at the common law (5). And so great was the efficacy of the consideration of the bargain and sale at common law, that, before the statute of uses, a bargain and sale *generally*, without the word *heirs*, carried the whole estate to the bargainee (6). But as the consideration of the conveyance by bargain and sale imported some ceremony and act of ‖notoriety which certi- 89
fied the alteration of property to those whose rights or tenures were consequentially affected, it possessed a virtue, at common law, above the consideration, whereby uses were raised upon the strength of mere proximity of blood, which, according to the prevailing opinion, required the solemnity of a deed of

(d) An use, when once raised, may be passed by grant to a stranger without consideration, but there must always be a good consideration to create it de novo. Vid. Doct. and Stud. Dial. 2. ch. 22, 23.

(e) If a specific delivery accompanied the transfer of property, it was a gift, and was said to be binding without any consideration. Vid. Plowd. 302.

(5) 2 Inst. 675. and vid 1 Leon. 18.

(6) 1 Rep. 87 b.

* 3 Vent. 318; Sid. 25; Gilb. Uses 115; Moore 122; Cro. Eliz. 279; Silvester v. Wilson, 2 T. R. 444; 2 Lord Raym. 801; do. 854; Hard. 89.

covenant *(f)* to render it effectual; and it seems as if the obligatory strength of the instrument was incorporated with the consideration of blood, to compose the validity and efficacy of the conveyance.

It appears that before the statute of uses, 27 Hen. 8. c. 10, the covenant to stand seized to an use, afforded a two fold remedy. Damages, for the breach, were recover-
90 able at law, but a specific performance was only ‖compellable in equity *(g)*: but, by that statute, the use being executed, the remedy by action was superseded; for, as the use was transferred by *parliament*, it could not be transferred by the *party*. And though, perhaps, where *no use* is raised, an action may yet lie upon the covenant, yet, where the covenant operates to legitimate the use, the force of it is spent in the immediate execution of the use by the statute. And so distinct has the executory covenant been held from the covenant to stand seized, that it was the opinion of Lord Hobart, that when a covenant sounds in action only, it shall not avail to the creation of an use (7). It seems clear then, that, although a deed of covenant may be necessary to give activity to an use, yet, that the use receives its essential virtue immediately from the consideration. Bromley, in his argument in the case of *Sharrington* v. *Strotton* (8,) urged the solemnity of the
91 deed as a sufficient foundation for the use; but the ‖judges were silent upon that ground, although called upon for the reasons of the judgment; and, indeed, it should seem a manifest violence done to its own rules, if the law could allow this virtue to a mere instrument, unattended by livery of seisin, or

(f) Consult the cases cited in Page v. Moulton, Dyer 296. last edition, and Sheppard's Touchst. 483; see also Sir Thomas Raym. 47. Lord Raym. 290. 2 Com. Dig. 569. Gilb. Uses, 60. Moore 688. Hob. 313. and 2 Wils. 75.

(g) Uses, which are said to have originated in covin, appear for some time, to have been a very precarious and ill ascertained interest. It seems that the subpœna was an invention of an ecclesiastical chancellor, in the reign of Rich. 2. and it was not till Edw. 4th's time, that the process in bill and subpœna became the daily practice of the court of chancery. Vid. 3 Black. Com. 52.

(7) Vide Winch. 1, 60, 61; Plowd. Com. 307; Finch. 158; and vid. Sid. 27. and the opinion of Lord Hobart, there cited and confirmed, by Ch. J. Bridgman.

(8) Plowd. Com. 308.

matter of record. But, together with the remedy by action, the specific performance of the use in chancery was absorbed in the efficacy of the statute of uses, so that, perhaps, at this day, the covenant to stand seised has lost its obligatory, and retains merely its declaratory force. We may add, too, that, if the covenant alone, without the consideration, could have given birth to an use; a man might raise an interest in another, when he had none in himself, by covenanting to stand seised to the use of another, of land, which he should hereafter purchase. But, by the rule of law, no covenant or bargain and sale, can pass an use, if the covenantor or bargainor has not seisin of the estate at the time of such covenant or bargain and sale (9): and such covenant or contract would have been equally void in equity before the statute: so that, in such case, the use could never rise to ‖ be executed by the statute of uses, which 92
created no new estate in the use, but executed the estate to the use created. And so strict is the law in requiring a present seisin, out of which the use is to spring, that a bargain and sale of land, with a way over *other* land, whereof the bargainor is also seised, without words of *grant*, has been held not to pass the interest (10). For the way not being in existence at the time of the bargain and sale, if it were to take effect in the bargainee, would pass without any previous seisin in the bargainor. But a rent charge *de novo* may be so created, because it is not collateral to, but comes out of the land whereof there *is* a seisin.

We must at this day look upon these imperfect modes of conveyance as rendered perfect by the statute of uses; and the *remedies* at law and in equity, upon the contract or consideration, wholly gone, as far as they respected the *effectuation* of the use; and that, though, out of regard to the consideration, if a bargain and sale had been made at common law, to a man *generally*, without mention of his *heirs*, a court of ‖equity 93
would have decreed an estate in fee; yet, that, since the statute 27 H. 8. c. 10. the bargain and sale has become a strict legal conveyance, which carries at once the estate in the land, and that, in a case of such general disposition the *inheritance* would not now pass to the bargainee. (11)

(9) 2 Roll. Abr. 79; Cro. El. 401. (10) Cro. Jac. 190. (11) 1 Rep. 87. b. 100. b.

The difference in their legal consequence to strangers, between conveyances and contracts, accounts, in part, for the difference in the consideration, necessary in our law, to raise the use upon these dispositions of property, and to support an actionable promise; for as the legal validity of a promise depends only upon the evidence of real intention to be bound, and not at all upon the publicity of the contract; many circumstances of private inducement may become the foundation for an *assumpsit*, which would fail as the consideration of a bargain and sale, or covenant to stand seised, from the want of a sufficient ostensibility in the motive. On the other hand, valid considerations to uphold bargains and sales, and covenants to stand seised to uses,
94 would be ‖insufficient to sustain actions upon promises by reason of their ambiguity, as an indication of deliberate intention to become bound to the performance. So the consideration of natural affection is inadequate to sustain a promise, and the obligations of conscience which will support an *assumpsit*, will not raise the uses, either upon covenants to stand seised, or bargains and sales. It is true that the contracts on which *assumpsits* are founded, are, in many points, governed by the same rules as the consideration of the bargain and sale, but they differ broadly in this, that, whereas, in the bargain and sale, the foundation of the contract is the mutuality of recompence (12), the consideration for an *assumpsit* may arise on one side only; and it is enough if loss or charge accrues to the promisee, without benefit or profit to the person promising (13). And, again, a promise will be good upon a consideration past, if moved by precedent request (14). But the contract of the bargain and sale is wholly of an *executory* nature.

The bargain and sale, and covenant to stand seised, leaving nothing new to be done, so that the use, once raised and
95 perfected,is not liable ‖to be destroyed by subsequent events: whereas, promises, being prospective to a future act, leave room for intervenient events, by destroying the consideration, to anticipate the execution of the contract. It is a plain ethical

(12) Vid. Plowd. Com. 303.

(13) Vid Doctor and Student, Dial. 2. c. 24. 17th edit. p. 179.

(14) Vid. 1 Roll. Abr. 11, 12, 13; Brooke Action, 7. pl. 88; 1 Ro. R. 381; Cro. Car. 409.

rule, that whatever a man seriously promises, he is morally bound to perform, the consideration, therefore, by which promises are moved, is not in our law, nor can be in any law, of the essence and constitution of the promise itself; it is a medium only for discovering the serious intention of the party, at the time of making it, to be bound to the performance: But the dignity and force of the consideration itself, in these creations of new uses, is intrinsically regarded by the law, which looks watchfully at those acts that are to disappoint the expectation of heirs, and to produce relative consequential changes in the tenures and rights of others. A promise which gives a *right* only to the thing, and not the thing itself, may suspend its performance upon the *proof* of its reality, and time is given for moral obligations to be ascertained by facts, so as to become an evidence of ‖grave and intentional promise: but, where, as in these 96 transfers of property, the perfection of the use is coeval with the contract, and the consideration speaks in the newborn interest, a motive of obvious and direct influence, such as the visible inducement of proximity of blood, or of recompence in value, is, as it seems, expected by the law as the consideration to legalize and effectuate the transfer. The law of this country, which has laid its foundations in nature, has carried its respect very far for the uses raised upon the affections of blood, to which the covenant has supplied the solemnity of its testimonial. They remained untouched when the cautious spirit of our ancestors, by the statute of enrolments, imposed a check even upon the uses which arise by contract. Natural affection, founded on consanguinity, was an ostensible motive, while the inducements of moral obligation, have no visible pledge of their certainty, but rest in the cognizance of a small number, or in the averment of the party. Thus the lines of distinction are easily traceable between these different considerations, and, as before has been remarked, they are ‖ all plainly distinguishable in principle from 97 the valuable consideration under the statute of Elizabeth.

It is in this *respect* for the consideration of contracts, that, on this subject, the rules of our law are remarkably distinguished from the civil. The common law of England has always made a difference between the binding force of light and verbal, and of serious and deliberate promises. The civil law has proceeded

upon the same distinction. The same final object of discovering the real intention, and the same allowance for levity in the promise, are characteristic of both systems of jurisprudence, but they try and decide the sanctity and lubricity of promises, by different *criteria*. In the law of Rome, to parties veritably intending to be bound, certain stipulatory forms and phrases were supplied (15), which gave judical sanctity and obligation to their verbal engagements; while our municipal common law looks only to the consideration and motive, as the foundation of its judg-
98 ment, between deliberate and rash, actionable and ‖ unactionable promises. By the solemn and settled reciprocation of question and answer, by which *verbal* contracts were ratified in the civil law, it was considered that the mind gained leisure for deliberation, and was awakened to exert its natural liberty, so that if the stipulator adopted the words prescribed, he was understood to manifest a serious intention to become bound by his promise. But the serious intention of the promisor is held to be manifested in our law by the consideration alone, and the most solemn asservations will fail as the ground of an *assumpsit*, if the consideration be insufficient; although it is to be observed, that words are so far respected in our law, as that, if they do not amount in common understanding, to a declaration or intimation of serious intention no consideration will ground a legal promise, unless there be such receipt of goods, or money as in justice, requires remuneration and recompence. The reasoning of the judge in the case
99 of *Pillans* v. *Van Mierop*, (16),* by which it was ‖attempted to be shewn, that, both in the common law of England, and in the law of Rome, promises committed to writing were binding, without consideration, seems to have passed without particular notice by the other judges, who choose rather to advert exclusively to the commercial exigency of the instrument, which was in dispute, as the foundation of their opinion in favor of its validity. Upon the whole it seems, that, without consideration or writing, by the precise observance of a stated alternacy

(15) Vid. Vinnius, 595. et seq. Lexicon Juridicum, tit. Stipulation, 838.
(16) 3 Burr 1970.

*But see *Rann* v. *Hughes*, 7 T. R. 350, note; 2 Sel. 732; *Hauks & wife* v. *Saunders*, Cowp. 291; Murph. R. 335.

of verbal question and answer, a promise was binding in the civil law; and that, where a promise in *writing* was availing on that account, the circumstances of its being in *writing*, was only operative as testimony, and by way of publication, and not as a necessary part of its legal and binding efficacy. *Ad fidem rei gestæ valent ad obligationem nunquam* (17). But in our English common law, a consideration of some sort is always necessary to raise an *assumpsit*, or actionable promise. A written promise with us imports no higher consideration, though it furnishes better means of ‖proof, than a promise by parol, 100 unless in cases, where sealing and delivery have made it a deed, or its form and object have invested it with the qualities of a negotiable instrument, by custom or statute. With respect, however, to this necessity for a consideration, of some sort, to support a promise at law, it may be observed that, the intention to be bound, where the act of contracting is proved, shall be presumed, if, by any construction, it may. Indeed the benefit or loss, which is the consideration of the promise, need never be formally expressed in the declaration. If it can be collected by natural inference, it will support the action. But to *subvert* a contract, the nullity of consideration must always be *manifest*. (19)

(17) Vinnius 664.

(19) Vid. 1 Sid. 212, 213, 283. Moore, 412. Raym. 153. Cro. Eliz. 206, 470.

CHAPTER II.

SECTION I.

The subject demands some enquiry into the nature and extent of the marriage consideration.‖ As to which, it may be observed, that there are two sorts of consideration, by which any use may be raised,—*valuable* and *natural*. The first branches itself into numerous modifications, some of which will be attempted to be explained in this treatise. The consideration of blood, is not the only natural consideration. Marriage is also considered as a natural consideration, to raise an use at common law, and formerly a common mode of making settlements, was, by covenant to stand seised to uses. But the marriage consideration goes further than the consideration of blood, in raising uses upon a covenant to stand seised, for a man seised of land in fee
102 simple, may covenant to stand seised of it to the ‖use of the woman he intends to marry, or to the use of any woman whom his son or his kinsman (1) is about to marry, and if the marriage take effect, the use will arise accordingly. *(a)*

Delamer's case in Plowden's Commentaries, gives, as a reason for the marriage consideration's being sufficient to raise an use, the benefit derived to the settlor or donor, by the advancement of his child, and his own liberation from the charge of maintenance, but this can only account for it where the provision moves from the parent, or person in *loco parentis*;
103 yet, where ‖the intended husband himself makes the settlement of his own estate, by covenant to stand seised, the

(a) The consideration of marriage had always an efficacy above the mere consideration of blood, one instance of which was its power of grounding an assumpsit, to which purpose the consideration of blood was a *nudum pactum*, and see Cro. Eliz. 755. and see the great importance of the marriage consideration, Plowd. Com. 58.

It is from the great favor borne by the common law to the consideration of marriage, that the words "*in liberum marritagium*" in the case of gifts in frankmarriage, had power to create an estate of inheritance against the general rule of law, i. e. without livery of seisin. Vid. Co. Litt. 21 b.

(1) Plowd. 307. 2 Roll. Abr. 783.

use will be raised; and the reason in Plowden stops short of such a case. Afterwards, when the marriage consideration came to be considered as *valuable*, the reason of its title to be regarded as such, was more sensibly inferred from the reciprocal reliance of the parties to the matrimonial contract. There is a case in Roll's Reports, (2) wherein the efficacy of the marriage consideration was the single point before the court, and the question, whether it had strength enough to change an use previously raised, was treated as depending on the question, whether it was a valuable, or only a natural consideration. The case was as follows in substance: J. S. was enfeoffed of land, upon a secret trust that the feoffor should have the land again upon a certain condition's being performed; the feoffee, upon consideration of natural affection to his daughter, conveyed the land in *marriage* with her; and the question was, whether the husband of the daughter of the second feoffee, having ||no 104 notice of the secret trust, should be chargeable with such trust or not. And it was insisted at the bar, that he should, for marriage was only a natural, and not a valuable consideration, and was a sufficient consideration to raise an *assumpsit*, or to *raise* an use, but was too weak to *change* or *destroy* an use already created and raised.—It was also urged, by way of analogous reasoning, that, if a feoffee to uses, enfeoffs a stranger upon good *(b)* consideration, without notice, the former use is changed, but if such a feoffee endow his wife *ad ostium ecclesiæ*, or *ex assensu patris*, *(c)* the former uses remained unaltered. And it was further argued, that if a father should bargain and sell to his own son *bona fide*, and for valuable consideration, this would be out of the statute of Malborough, and ||the 105 feoffment would not be covinous; but if land were conveyed by him in consideration of marriage only, this would be within that statute, and, by consequence, fraudulent in law.

(2) Sir George Reynel v. Peacock, 2 Roll. 105.

(b) By *good* consideration is intended *valuable*.

(c) These estates were a kind of jointure at common law, in which the general rules of conveying real property were dispensed with in favor of the consideration of marriage. They were necessarily derived out of the lands subject to dower, for till the statute 27th H. 8. c. 10. the right of dower could not be barred by the acceptance of a collateral satisfaction. Vid. Co. Litt. 36. b.

But Bacon, Lord Chancellor, though he assented to the proposition, that the consideration to destroy an use, ought to be stronger than the consideration to raise an use, observed, that it would be of mischievous consequences, if he, who married in consideration of the land, should not avoid the trust, for that he gave up the chance of other preferment, in expectation of the promised provision, and in this view the consideration which he gives is *valuable.*

In the case above cited we have seen it questioned, whether the consideration of marriage be a valuable consideration; that point has long ago been settled in the affirmative, and at this day such a consideration clearly makes a conveyance good against purchasers, under the statute 27 Eliz. and gives a title to the benefit of that statute against former fraudulent convey-
106 ances. ‖There was yet, however, a necessary difference, in the inherent qualities, between the valuable consideration of marriage, which must still partake of the consideration of natural affection, and the valuable consideration of money, which gives effect to a conveyance by bargain and sale. And this difference will be best explained by recalling the attention of the reader to the characteristic properties of the two sorts of consideration above mentioned,—natural and valuable.

It is both reason and law, that the natural consideration of love and affection should be personal and exclusive, and that the use can be extended to no person to whom the consideration will not also extend. Sir Robert Worseley, seised of certain
107 land in fee *(d)*, and ‖having issue, two sons, the elder a *mulier*, the younger a *bastard*, covenanted by indenture, enrolled in chancery, with his eldest son, and two others, strangers, to convey the said land to the two strangers in fee, before a certain day, to the use of himself for the term of his life, and after his decease to the use of the eldest son, and of the heirs male of his body; and for default of such issue, to the use of

(*d*) It may be of some utility to observe, that it is now settled, that tenant in tail may convey a base fee, by covenant to stand seised to uses. For it was a fee simple, conditional at common law, and the stat. de donis has not altered the estate itself, but only provided that the issue shall not be disinherited by the alienation of his ancestor. Lord Raym. 779. where the case in 1 Saunders, 160. is denied by Holt, C. J. Com. 121. pl. 84. 7 Mod. 18. See the contrary doctrine in 1 Dyer, 8. b. Jenk. Cent. 5. case 1. Lit. sect. 606. 612, 613.

the said bastard son, (calling him Richard Worseley, his bastard son) in like entail, &c. And, further, covenanted and granted that he, and all other persons who were then seised, or might be seised, &c. should be and stand seised to the said uses and intents, and to no other uses and intents. And all the justices, except Periam, held, that the use could not be carried to the bastard *(e,)* without express ‖consideration, because the 108
consideration in law was not good and legal, for he is not of the blood of the father, ‖but in law, a mere stranger *(f)*. 109
That the effect of the valuable consideration in a bargain and sale, is not so restricted in its operation, appears from the

(e) The dissent of Periam, J. from the opinion of the other judges, was founded on a doubt, whether a bastard was such a stranger in blood, as that the use could not rise to him. The same case is reported in 1 And. 75. without mention of any difference of opinion on the bench. All, however, seem to be agreed as to the general rule, that a perfect stranger in blood, is incapable of taking an use upon a covenant to stand seised. The rule, however, yields to certain exceptions. It has been said that if A. covenants with B. in consideration of the marriage of his daughter with the son of B. to stand seised to the use of C. a stranger, for life, and then to the use of the son and wife in tail, the use will rise to C., although he is a stranger, for the sake of the remainder, which could not take effect as a remainder, without the previous particular estate to constitute it such. Shep. T. 488. and vid. Machell v. Clark, Lord Raym. 779. Crompt. J. C. 63. a. But where there are intermediate uses to strangers, by way of remainder, as the case put in Plowd. 307. it seems the better doctrine to consider them as void *a principio*, for they are not wanting to give effect to the ulterior use as a remainder, which in such case may be accelerated in interest; and, on this principle, the case in Plowden was called by Moore in 4 Leon. 137 a conceit, and said by him to be ruled not law in Lord Paget's case. The use resulting to the covenantor in Pybus v. Mitford, 2 Lev. 75. turned upon the doctrine so copiously treated by Mr. Fearne, Cont. Rem. 43 et seq. which doctrine seemed in Pybus v. Mitford to be thought to be essential to the validity of the limitation to the heirs male of the body of the covenantor. Sed vid. Wils. v. Palmer, 5 Burr. 2616. Where a contingent remainder is limited after an use to a stranger, upon a covenant to stand seised, the necessity of such saving construction for the sake of the remainder, as is above mentioned, will readily occur to the reader.

(f) Dyer, 374. Gerrard qu. t. against Worseley; and see the case of Goodtitle v. Petto, Strange, 934. where a general power of appointment, by this mode of conveyance, limited by a man to his wife, after giving her an use for life, was adjudged void, notwithstanding he might well have given her an estate, in fee simple, which would have necessarily included a power of free disposition.

2d of the Institutes, where the following case is put by Lord Coke: "If A. by deed indented and inrolled, in consideration of one hundred pounds paid by B. bargains and sells land to B. C. and D. the land passes to all; for although the valuable consideration be expressed to be paid only by one, yet, it must be intended, that it was paid by all, that the land may pass to all."

But the marriage consideration, which may be regarded
110 as partly natural, and partly valuable, has not ‖attained to this extent of operation. If the settlement is made by covenant to stand seised, the use will be carried by the pure force of the natural consideration of marriage, to all the objects of the matrimonial union, and by force of the consideration of blood (which need not, in such case, be expressed) to all the collateral relations of the settlor; but the valuable consideration stops short of this extent; and, though the uses will rise in such a case in favor of these remote kindred, or in favor of strangers, if the settlement be grounded on a conveyance, operating by transmutation of possession, yet the meritorious efficacy of the valuable consideration of marriage, will bind itself to the persons included within the view of the settlement (3). This limited extent of the valuable consideration of marriage, which is, nevertheless, of the highest estimation in law, is a consequence of the plain object of the institution,—the foundation of a new family. In the passage above cited from the 2d Institute, we observe
111 ‖that to carry the effect of a bargain and sale to C. and D. they must each be *supposed* to have contributed to the consideration; but such a supposition, in the case of marriage, would import a contradiction to the nature and purposes of the institution.

SECTION II.

112 After the passing of the statutes of Elizabeth, against fraudulent conveyances, when questions began to arise with respect to their operation on marriage settlements, it became necessary more accurately to inquire in every case, how far the

(3) Roll. Abr. 784. pl. 5. Moore, 504.

valuable consideration extended; and one of the first points expedient to be settled was, whether, where a settlement was made before, and in consideration of marriage, there being evidence of a good primary inducement, the secondary and remote limitations could be regarded as parts of an entire transaction, and as saved by the efficacy of the original motive, from the operation of the above mentioned statutes. It was admitted in the case of *Bellingham* v. *Lowther*, reported in 1 Ch. Cas. 243, and cited by Talbot, in *Osgood* v. *Strode*, (1) as a point settled by *Sir John Jacob's* case, that a deed might be fraudulent as to one, and good as to another.

‖ Indeed, in the case already cited from Lane (2), the 113 same doctrine had many years before been implicitly maintained in the court of exchequer. It has received confirmation (3) from such a variety of subsequent cases, that it ought not to be lightly disputed. It is true, that it appears from what fell from Lord Hardwicke in *Goring* v. *Nash*, (4), that courts of equity will not decree a *partial* performance of articles, and that they have sometimes decreed the performance of articles in favor of *volunteers*, on the ground that *part* of the articles ought clearly to be performed, and because they will not split agreements *(a)*; but the observation was intended to be applied only to cases where no creditors or purchasers for valuable consideration appeared, and where the persons calling for the execution of the articles were purchasers in the first or second degree; and, even as to cases so circumstanced, it was at the same time observed by his Lordship, that, where *some* of the ‖objects 114 appeared clearly improper to be enforced, a bill for a specific performance has been dismissed *in toto*; so that his Lordship's observation, which, as to this point, is only explanatory of the usage of the courts of equity in granting their assistance in certain cases, does not wholly reject the principle above stated from cases in *those courts* between purchasers in the second de-

(1) 2 P. Wms. 248. (2) 2 Lane, 22.

(3) Style 428. and see 2 Lev. 105. White v. Stringer, 1 Vern. 285. Jason v. Jervis; and see this point admitted Hard. 397 by the counsel for the defendant in Jenkins v. Kemyshe. See also Martin v. Seamore, 1 Ch. Ca. 170.

(4) 3 Atk. 190.

(a) The same rule was acquiesced in by Lord Hardwicke, in 1 Ves. 453.

gree, as wives and children, and the legal representatives of settlors; for, though the aid of the court is not to be refused or granted by piecemeal, yet, if the question, whether relief or not turns upon the preponderancy of the meritorious or the merely voluntary parts of a deed, the inequality of the limitations in the same instrument, in point of substantive validity, is fully admitted. And, although the above mentioned observation of Lord Hardwicke, may seem to go the length of affirming, that, where the primary motives of the settlor are among the considerations of the second rank in courts of equity, subsequent limitations and provisions, contained in the same deed, though not within the scope of the original consideration, are not to be im-
115 peached, unless ‖by purchasers for valuable consideration, but shall be protected by the goodness of the original intention; yet, an attentive examiner of the grounds of judicial determinations will remark the anxiety even of courts of equity in cases disputed between persons claiming under articles and legal representatives, to seek a justification for the support given to such collateral limitations and provisions in some slight accessorial or derivative admixture of valuable consideration.

SECTION III.

116 ‖ This inquiry will often lead to the consideration of cases resolved in the court of chancery, wherein neither creditors nor purchasers have been concerned, but the contest has been maintained by persons claiming under articles and covenants, against legal representatives. The distinction between voluntary and valuable claims, formed a natural object of that court's jurisdiction, before it became a question for a court of law; for, until the passing of the statutes under discussion, voluntary conveyances and covenants could not be impeached in common law courts; to which it was not competent to infer fraud from the want of consideration in a conveyance, though followed by a sale for value. But as the jurisdiction of a court of equity, by its power of binding the conscience, was the proper resort

for ‖compelling the specific performance of contracts, for inforcing the discharge of trusts, and for supplying defective executions of powers, and the want of surrenders of copyhold estates, the balance of pretensions in the scale of consideration, has always been a principal part of equitable cognizance.

Covenants and conveyances, merely voluntary, have always, in courts of equity, been regarded in an unfavorable light; and in disputes between heirs at law, and persons praying the specific performance of articles, under which they are *remotely* entitled, the question is sometimes argued with as scrupulous a requisition of the marks of valuable consideration, as, where a purchaser is disputing in a court of law, the validity of a prior conveyance, under the statute 27 Eliz. If the equity of parties are equal, a court of equity has no foundation to act upon: where, in such a case, the legal title is found, there it is suffered to remain: for the rule is, that law and equity together, shall prevail against equity alone, if the equity that goes with the law is as ‖strong 118 as the opposing equity. So that in a court of equity, an heir cannot disturb a voluntary alienee, neither can a stranger who has nothing but a mere voluntary *covenant* to rely on, prevail against an heir at law (1). But this equilibrium may be easily disturbed. In many cases, valuable consideration is not necessary to constitute a purchaser in the understanding of a court of equity. The natural obligations of parents and husbands, is looked upon as making wives and children purchasers, where creditors, or purchasers for valuable consideration, are not concerned (2), and younger children are sometimes said to be in the nature of creditors. Where the contest has been only with the legal representative, articles have been decreed in favor of collaterals, to whom the marriage consideration could not extend, (3). And where, in such a case, the application has been made by a person directly claiming under the consideration of the marriage articles, the court has extended the benefit of its decree to remote objects, rather than garble and split agreements (4).

The court ‖of chancery grants its relief with more reserve, 119

(1) 1 Ves. 412.
(2) 3 Atk. 191 and see Uvedale v. Halfpenny, 2 P. Wms. 152.
(3) 3 Atk. 188. Vernon v. Vernon. 2 P. Wms. 594.
(4) 3 Atk. 190.

where it is called upon to supply surrenders of copyholds, or to help defective executions of powers; and will lend itself only to creditors, wives or children, in such cases, and not to *them*, if the heir at law, being a child, will thereby be left unprovided for (5). But where there is marriage, or other valuable consideration, courts of equity will always supply the defective execution of a power, as well as compel the specific performance of articles. And, generally, whatever it is in the power of the person covenanting to do, provided the covenant be for valuable consideration, equity will look upon as done, and will supply the want of circumstances, not only against an heir, who claims *under* the covenantor, but against the remainder-man, who does not *so* claim (6).

In cases where *remote* objects of marriage articles have applied to the court for the execution of so much of the articles as relate to them, the court has looked narrowly for some tincture of
120 valuable consideration. ‖And where no shade of value has been discoverable, these distant claims have been disregarded, and treated as too insignificant to be admitted to disturb the legal title of the real or personal representatives. The cases of *Vernon* v. *Vernon*, (7) *Stephens* v. *Trueman*, (8) and *Goring* v. *Nash*, (9) are instances of the specific execution of articles, in favor of *near* kindred, not within the marriage consideration, for whose sake the court will interfere upon very slight grounds, as was observed by Lord Hardwicke, in the above mentioned case of *Stephens* v. *Trueman*; and, indeed, in all the three cases last referred to, the mere right in trustees, to bring an action at law, was considered by the court, where the claim was by parties so *nearly* related to the settler as a foundation for the decree, notwithstanding it was urged that voluntary covenants are not respected in courts of law, where they never obtain more than nominal damages.

In the case of *Osgood* v. *Strode* (10), the bill praying to
121 have the marriage articles carried into execution, ‖was brought by the grandson of the settler, claiming under a

(5) Coke's edit. of P. Wms. 1. vol. 60. note.
(6) Cotton v. Layer, 2 P. Wms. 623.
(7) 2 P. Wms. 594. (8) 1 Ves. 73. (9) 3 Atk. 188.
(10) 2 P. Wms. 245.

limitation, both remote and collateral to the consideration o marriage: there the court looked anxiously about for a ground t consider him as a purchaser: and this is a case wherein mucl refinement of reasoning is introduced on the subject of *con sideration.* Many other cases of this description, determined i the court of chancery, though involving no question upon th statutes of Elizabeth against fraudulent gifts and conveyances materially conduce to illustrate the points of view in which case may be regarded as extending the shelter of the valuable consideration beyond the primary objects of a marriage settlement. In deciding cases upon the statutes, courts of equity hold themselves bound by a stricter measure, as was observed by Lord Hardwicke in *Goring* v. *Nash,* than in family cases, where the question always is, whether a superior or inferior equity arises on the part of the person who comes for a specific performance. (11) But this stricter measure is not *so* strict, according to some ‖opinions, as that the court of chancery will set aside a 122 voluntary conveyance, merely for being voluntary, unless it can discover in it actual fraud. The distinction, laid down by Lord Hardwicke, in *Bennett* v. *Musgrove,* (12) was as follows: "Where a subsequent purchaser, for valuable consideration, would recover the estate, and set aside, or get the better of, a precedent voluntary conveyance, if the conveyance was fairly made, and without actual fraud, the court will say, take your remedy at law; but wherever the conveyance is attended with actual fraud, though they *might* go to law, by ejectment, and recover the possession, they may come into this court to set aside the conveyance." But it is to be remembered, that his Lordship introduced this distinction with the remark, that courts of law are *obliged* to construe all voluntary conveyances fraudulent. And it is also worthy of remembrance, that his Lordship in *Russel* v. *Hammond,* (13) declared, that he would not lay down any other rule in equity than what is followed at law upon these statutes of Elizabeth.

(11) 3 Atk. 188. 1 P. Wms. 227.
(12) 2 Ves. 57.
(13) 1 Atk. 15.

SECTION IV.

123 ‖ The words of Lord Hale in *Jenkins* v. *Kemyche* as the case is reported in Hardress (1) are as follows: "The consideration of marriage, and of the marriage portion, will run to all the estates raised by the settlement, although the marriage is not concerned in them, so as to make them good against purchasers, and to avoid a voluntary conveyance;" which words were cited and much relied upon by the counsel for the plaintiff in *Osgood* v. *Strode:* But Lord Chancellor Macclesfield seemed to consider that theory as too refined, for it was observed by him in the same case, that "the marriage and marriage portion support only the limitations to the husband and wife, and their issue; and that this was all that could be presumed to be stipulated for by the wife and her friends." His Lordship further observed that as to the case of *Jenkins* v. *Kemyche*, where
124 ‖there was a limitation to the heirs of the body of the husband by any other wife, that limitation, though not made for a valuable consideration, was however, not fraudulent, for that there was a fair and honest occasion for the making of such settlement, *i. e.* the marriage." This defence, on the ground of fair and honest intention in making the settlement, seems to be an illogical anticipation of the question on these statutes of Elizabeth,—an assumption of *that*, which it is apprehended, is the very thing in dispute. This probably appeared to Lord Hale (it is not irreverent to conjecture the reasons by which the minds of great men have been influenced, when great men disagree with each other) as too loose a criterion, or he would have adopted it in preference to an abstruce unsubstantial notion, which the understanding cannot steadily embrace. Perhaps his regard to the rigorous sense which some might at that time attribute to the word *voluntary*, as applicable to every limitation or provision, which was not purchased by the marriage consideration or portion, induced him to stretch, by artificial reasoning, the con-
125 sideration of marriage beyond ‖its natural and obvious extension, and to overlook those characters of purchase and contract, which in a more enlarged interpretation of the word

(1) Hard. 393.

purchase, and a narrower and more rational comprehension given to the word *voluntary*, will often cast an impression of value on those collateral limitations which lie out of the compass of the matrimonial consideration.

There appears to be a sensible ground for the observation of Lord Macclesfield before mentioned, "that the marriage and marriage portion support only the limitation to the husband and wife and their issue; and that this is all that can be presumed to have been stipulated for by the wife or her friends." If there be no party to a settlement, but the husband and wife, and the friends of the wife, no limitation in such settlement of the husband's estate in favor of collateral relations of the husband, can be considered as fortified by the consideration of marriage as against creditors and subsequent purchasers. In the case of *Vernon* v. *Vernon*, (2) the estate‖ moved wholly from Thomas 126
Vernon the Husband, who, in his marriage articles, covenanted to lay out a certain sum in the purchase of lands, and to settle the same on himself and his wife for their lives, remainder to their first and every other son in tail male, remainder to the heirs male of Thomas Vernon, remainder to George Vernon, one of the brothers of the husband, for life, remainder to his first and every other son in tail male, remainder to Sir Charles Vernon, another brother, for life, remainder to his first and every other son in tail male, remainder to Thomas Vernon the husband in fee: to which articles Sir Thomas Vernon the father was a party, but neither *gave* nor covenanted to *pay* or *settle* any thing upon the marriage. After the decease of Thomas Vernon without issue, the brothers brought their bill against the widow, who was a devisee of the whole of this estate by the will of her husband made subsequently to the articles, for the specific performance of the articles; and performance was decreed; through the chancellor ‖was clearly of opinion that such an 127
agreement ought not to be performed against a creditor. *(a)*

(2) 2 P. Wms. 59.

(a) In Vernon v. Vernon the court adopted, as the ground of its resolution, the right of action at law in the trustees, upon the covenants with them in the marriage articles. The influenc of which covenants upon the relief in courts of Equity, may be collected from the above mentioned case, and from Goring v. Nash, or Fagg v. Nash, 3 Atk. 188, and Williamson v. Godrington, 1 Ves.

It seems indeed a clear proposition that where there are no parties to a settlement, besides the husband and the wife and her friends, the consideration of marriage and the marriage portion can look only to the establishment of the new family. When we would bring in a person as a valuable purchaser, we
128 must find at least ‖some shew of a contract or stipulation whereon to ground the inference; but in the case last supposed, there is no person to stipulate or contract in behalf of the husband's relation. The husband cannot contract with himself, nor, without almost equal violence to sense, can we suppose him to *contract* for the disposal of *that* which is his *own*; still less plausible would be the supposition that the wife or her friends had bargained for a benefit to a collateral relation of the
129 husband. ‖The case of *Vernon* v. *Vernon* is a remarkable instance of the doctrine—that Courts of Equity will decree execution in favor of collateral limitations to *near* kindred in marriage articles, as against the representatives of the settler; and though the counsel for the plaintiff in that case took pains to identify it in principle with the resolution in *Osgood* v. *Strode*, yet it was impossible to deny the strong distinction arising from the questionable interest of the father who joined in the settlement in the last mentioned case. In *Osgood* v. *Strode*, the

511. The judgment in Goring v. Nash was grounded upon the authority of Vernon v. Vernon; the result of which two cases is, that where the dispute is between a near collateral relation claiming under marriage articles, and the representatives of the settler, the court will not throw the party upon his remedy at law, but will decree specific relief, and that, notwithstanding a precedent limitation to the husband or settler, had the articles been carried into execution in his lifetime, would have made him tenant in tail, and so competent to bar the limitations over. But in Williamson v. Codrington, where the settlement was avpided by the sale of a purchaser for value, it was clear, that no specific relief could be granted. It was moreover, held, that no satisfaction in Equity can be demanded against the covenantor, or against his estate after his decease, unless it be such a covenant as that a suit at law may be maintained upon it. And in the last mentioned case the court made the measure of the retribution correspond with the spirit and intent of the transaction, and not with the letter of the covenant. In 1 Ves. 446. Lord H. observed, that there is a good ground for relief in specie, when damages at law would be an inadequate and ineffectual remedy. But Equity will often give relief, by compelling specific performance of agreements, where no remedy can be had at law; as in the case of infants and feme coverts, where the consideration is marriage, or where proper settlements are made after marriage. 2 P. Wms. 242.

remoteness of the collateral limitation seemed to create a necessity of finding somebody who might be considered in the light of a purchaser for the plaintiff, to turn the balance of equity in his favor against the real representative. Cases of this sort, it is true, are not direct authorities on questions which arise on the statutes of fraudulent conveyances; but as the Court of Chancery has adopted very narrow discriminations in determining contests between collateral claimants under marriage articles, and heirs at law, or other legal representatives, and has sought ‖with apparent solicitude to justify its support of 130 agreements by some traces of valuable consideration, the student will find assistance in his progress through the various determinations on the statutes of fraudulent conveyances by an attention to the grounds of these *equitable* judgments.

Although in the case, last supposed, of a settlement to which the intended husband and wife, and the friends of the wife, are the only parties, and where a collateral provision for a relation of the husband arises wholly out of the husband's estate, it is difficult to find a pretence of valuable consideration; yet, if a brother, or other relation of the husband, be made to take a benefit out of the property of the wife by a limitation over, after the issue of the marriage, such a limitation may be well enough supposed to have grown out of the marriage contract; for the husband has in such a case somebody to contract with, and there is a proper subject of stipulation and purchase. He is not bargaining for the privilege of disposing of his own, but contracting for an interest which is in the disposition of another. ‖In the case of *Edwards* v. *the Countess of Warwick* (3,) it 131 was agreed by the marriage articles, that £10,000 out of the wife's portion should be laid out in the purchase of lands to be settled to the same uses as the manor of K., the husband's estate, was to be settled, i. e. to the husband for life, then to the issue of the marriage in the usual form, and in default of issue to the heirs of the husband. The husband died, leaving his widow and one son, who after levying a fine of the manor of K. to the use of himself in fee, died without issue and intestate, and a bill was filed by the heir at law of the son to have the

(3) 2 P. Wms. 170.

mortgage, whereon the £10,000 had been laid out assigned to her. This was opposed by the widow as administratrix of her son, who contended that this £10,000, there being no issue of the marriage remaining, and so no person to claim within the view of the settlement, ought to be left, and treated as money, and be divided between herself and the half sister of the deceased son, according to the statute of distribution.

132 || This case was principally decided in favor of the heir against the personal representatives upon the well known equitable doctrine, that money, agreed to be laid out in the purchase of land, is to be considered as land, which again rests upon the more elementary doctrine of the courts of equity, that what is agreed to be done must be considered as already done; and consequently, the limitations in this case would attach upon the personalty as if it were land, unless the son, who had the dominion over it, had elected, by some decisive act, to treat it as money, which had not been done (4). Yet, since in the same case much stress was laid upon the limitation's being voluntary with respect to the heir, the court answered that argument by adverting to the room which the transaction afforded for for rationally supposing the husband to have stipulated for a benefit to himself out of the wife's portion. In this case, as in *Osgood* v. *Strode*, a very *remote* interest under the marriage articles was relied on by the person applying for a specific

133 performance, and, therefore, ||the court sought for a probable ground for inferring a species of contract and valuable consideration. In *Vernon* v. *Vernon*, where the party applying was a brother, a still slighter ground, such as the right of action in the trustees, was admitted to support the decree for the execution of the articles.

There was, indeed, in the case of *Vernon* v. *Vernon*, a sort of compassionate equity, *(b)* on which the chancellor laid con-

(4) See the case of Fulham v. Jones, 7 Vin. last ed. tit. Debtor and Creditor, 44.

(b) According to the articles, an estate tail to the settler was to precede the limitation to the brothers of the settler, so that their remainders were not only voluntary, but precarious, and in the power of Thomas Vernon the settler; and the same circumstance was insisted upon for the plaintiff in Bellingham v. Lowther. But in Vernon v. Vernon, by the will of a deceased elder brother, a

siderable stress, and which may be looked upon by some as distinguishing it in principle from *Bellingham* v. *Lowther*, (5) the circumstances of which ||are briefly as follows: 134 Sir H. Bellingham on his marriage with Catherine Lowther, covenanted to settle certain freehold lands to the use of himself and Catherine, his intended wife, for their lives, remainder to the heirs male of his body by her, remainder to the heirs male of his own body, remainder to his brother Allen Bellingham in tail, remainder to the heirs of Sir Henry, and covenanted to settle certain copyhold lands to the same uses. Sir H. Bellingham was travelling in order to make a surrender of his copyhold lands pursuant to his covenant, but fell sick by the way. He gave, however, a letter of attorney to other persons to make this surrender, but dying before it was done, the copyhold descended to his daughter as heir general; and his brother Allen Bellingham, who was the remainder-man in the articles, brought his bill to have the covenant executed by the heir at law, by conveying the copyhold to him in tail *prout* the articles. It was contended that the covenant was voluntary as to Allen Bellingham, the brother, he being no party to ||the 135 articles, nor within the consideration of the marriage or the marriage portion, and that the articles might be fraudulent as to the brother, though good as to the wife and issue of the marriage, and a voluntary conveyance to a younger brother ought not, if defective in law, to be made good in equity against an heir; for which reason the Lord Keeper dismissed the bill, and would not compel the execution of such voluntary articles.

It may be observed, too, that the heirs general, who probably were the children of the settler's daughters, would have gone without any inheritance, if the younger brother, who had already the whole freehold property, had been suffered to carry away the copyhold too.

The reader will perceive, that there is nothing in these obser-

personal estate had been bequeathed to the plaintiffs, which bequest was void as being too remote, and the present settler having had the advantage of the invalidity of that disposition, seemed to be bound in conscience to make some satisfaction to his brothers. And this circumstance seemed to weigh much with the chancellor.

(5) 1 Ch. Ca. 243.

vations inconsistent with the result of the authorities, which Mr. Coxe, in his note to the case of *Watts* v. *Bullas*, (6) has collected, to shew the extent to which the court carries its relief in cases of omission to surrender copyholds, and defective
136 executions ‖of powers, and which, according to those authorities, bounds itself to the claims of creditors, wives, and children. The present subject is confined wholly to marriage articles containing digressive limitations to collateral relations of the parties to the matrimonial contract; and where the goodness of the primary motive, coupled with the aversion of the court to a partial and imperfect execution of articles, puts these collateral limitations in a more favored situation than claimants under simple voluntary agreements, which do not turn upon such cardinal motive, as primarily influences the parties to a matrimonial contract. But though it seems that the court is averse to the partial execution of articles, yet, whether it will compel performance *at all* or not, depends upon the strength of the claim of the party applying; and that question must attract the whole stress of the inquiry respecting those degrees of consideration and inducement, which decide the preponderance of equity.

137 In cases of actual settlements, (which can only be ‖ disputed by creditors or purchasers,) courts of law have not proceeded on such notion of entirety in the construction of the instrument under these statutes of fraudulent conveyances, as by some seems to have been supposed, and to which supposition the doctrine of Lord Hale, before mentioned, appears to have lent some countenance.—But the terms of that doctrine are but faintly intelligible; and it seems that Lord Macclesfield, whose judgment wes extremely solid, was dissatisfied with its principle. It appears very clear, that the reasons on which the court of *chancery* grounds its refusal to execute articles partially, or, in the language of Lord Hardwicke, to garble and split agreements, ought not to govern the proceedings of a court of *law* upon these statutes. It was admitted, indeed, by Lord Hardwicke himself, in the case of *Goring* v. *Nash*, that this practice of the court of chancery, in respect to articles and agreements, does not extend

(6) 1 P. Wms. 50.

to the case wherein the interests of creditors or purchasers may be affected. In *Bellingham* v. *Lowther*, the construction, by courts of law, of legal executed settlements, ‖as fraud- 138
ulent as to one, and good as to another, under the statute, for which *Sir John Jacob's* case was cited, was suggested as furnishing a rule applicable to the case of specific performances in equity. But the instances are not analogous: the rule of not garbling agreements in equity, *admits* the partial validity of executed settlements at law, and of articles in equity, where creditors or purchasers are concerned: but in equity, whether the court will execute or not, where creditors and purchasers are not concerned, depends upon the merits of the person applying; but it will *wholly* execute, or *wholly* reject. In *Bellingham* v. *Lowther*, the court refused relief; but it was said by the court, that if the wife, who was a purchaser under the articles, had applied, they must have specifically carried into execution, and, as it seemed, they must have been integrally executed for the benefit of all *collateral* objects, as well as for the wife and the issue of the marriage.

SECTION V.

‖In supposing a case, wherein the intended husband and 139
wife, and the wife's friends are the only parties to the settlement, a narrow foundation has been taken, and one whereon it is difficult to frame a consideration for the support of limitations, beyond the marrying persons and their issue; but the case is greatly widened where the parents of the husband, having something to part with, and consequently some subject of stipulation and contract peculiar to themselves, are parties to the settlement.

On this head, however, it should be observed, that the case is always more widened, and affords greater scope for the supposition of contract, where the parent parts with only a partial interest, as by joining with the son in barring an entail, or by some other ‖contributary or auxiliary act, than where the 140
whole estate or interest on the husband's side, moves from

his parent; in which case, the father has nobody with whom he can reasonably be supposed to contract for the limitations to his other children, which are, in this latter supposition, to be carved out of an estate, over which he has the free and absolute dominion: whereas, if we suppose him to be only contributary and partially assisting, he may, with reason and probability, be presumed to stipulate for some provision, under the marriage settlement of one son, for the benefit of his other children, as the price of his concessions: the case, however, is *always* greatly strengthened by the conjunction of a *parent*, whatever be the quantity of interest moving from him, in as much as the brothers and sisters of the marrying son, are only collateral to such son, but are lineal to the common ancestor, and in the direct path of his natural affection and solicitude.

It appears that, on some such principle of reasoning, Lord
141 Macclesfield, in the case of *Osgood* v. *Strode*, ‖observed, that, "if old Lawrence, the father, had had the *whole* estate, he did not see with whom he could contract, except with the son's wife, and her friends, who could only make a good consideration for the husband and wife, and their issue."

Perhaps his lordship's idea may not be improperly presented to the reader in the following point of view. If the father, old Lawrence Head, had been undoubted legal owner of the whole estate, there would have been nobody to purchase an interest out of him for his grandson, the nephew of his marrying son; and as it was not to arise out of the wife's portion, or estate, he could not be regarded as a purchaser of it himself, for that would imply a sort of soliloquous bargain, grossly absurd in supposition; but, if we suppose a legal fee simple in the son, and that sort of dubious equity in the father, which was attributed to him in that case, he then had something to put into the scale of a contract or compromise with his son, enabling him to stipulate for a benefit to his grandson, which was to come out of his son's estate.

142 It is laid down in Lane's Reports (1), in the case of ‖*St. Saviour, in Southwark*, (which is important, as being one of the earliest extant on the statutes of fraudulent conveyances) as a resolution of the judges, that if a man, upon the marriage of

(1) Lane 29.

his son, with the daughter of B. covenants to stand seised of land to the use of his son, for his life, and then to the use of other his sons in remainder; such limitations to the other sons are voluntary *(a)*, as against a purchaser: for which decision no reason is given; but it readily occurs, that, if, as the statement of the case seems to import, the whole estate is to be understood to have moved from the father, there was nobody to whom the character of purchaser for the brothers could apply; and, perhaps, even had the father only *joined* with the marrying son, in barring an *entail*, so as, according to the foregoing rule, to let in the supposition of ‖his purchasing the limitation to the younger 143 brothers, out of the inheritance of the eldest son, yet the collusive and colorable complexion of the settlement, which comprised limitations to collateral objects, preceded by no provision for the issue of the marriage, would, notwithstanding such circumstances of consideration to support these collateral limitations, have endangered the transaction as against creditors or purchasers.

In the case of *Staplehill* v. *Bully* (2), determined near a century afterwards, the necessity of some farther consideration, than that of the marriage and marriage portion, to support these collateral limitations in marriage settlements, was felt by the court of chancery. In that case, where the whole estate seemed to come from the father of the husband, the limitation to the second son in tail, after an estate tail limited to the eldest son on his marriage, was considered as voluntary, because the consideration of the marriage did not extend to it.

‖ It should be observed, however, that though it was ex- 144 pressly held in this last mentioned case, that such collateral limitation was voluntary, yet there was here another circumstance which had great weight with the court; for, although in *Vernon* v. *Vernon*, and *Goring* v. *Nash*, (3) no stress was laid on the antecedent estate tail, *(b)* in the husband, yet, as in this case

(a) Here too the word "*voluntary*" seems to be used, as to the statute 27 Eliz., as having the same meaning with *fraudulent*.

(2) 2 Prec. in Chan. 223. (3) 1 Ves. 513.

(b) The reader will find the doctrine, as to this point, enlarged upon in the case of Ramsden v. Hylton, 2 Ves. 309. where the cases of Goring, or Fagg v. Nash, and Vernon v. Vernon, were relied upon by the chancellor. In Ramsden v.

of *Staplehill* v. *Bully*, the lease, against which relief was
145 sought, came out of the precedent ||estate tail, and it was said, that any conveyance by tenant in tail, in *equity* was good, both circumstances appear to have had weight in producing the decree.

In the case of *Roe*, on the demise of *Hamerton* against *Mitton*, (4) the opinion of the court of C. P. strongly featured with the masculine sense of the judge who pronounced it, while it described the efficacy, disclosed the necessity of some superadded interest, to operate by way of price or purchase for these collateral limitations in a settlement, when they are disputed by creditors or subsequent purchasers. The case was thus, as stated by the Lord Chief Justice. John Hammerton, in 1706, being seised in fee of the lands in question, and at the same time having a mother living, who had an annuity of £50 issuing out of the whole lands, and having two brothers, Thomas and Vavasor, entered into a treaty of marriage with Mary Kelly: the mother of John, previous to the marriage, agreed to part
146 with her security upon the *whole* ||lands for her annuity, and to take, instead thereof, a security for the same upon *part* of the lands. Accordingly, she and her son John, (the intended husband) joined in a fine, to deliver the whole lands from the said annuity; and in consideration of the marriage, and a portion of £1200 and of the said release of the said annuity, John Hamerton conveyed to trustees, upon trust to pay £50 a year to the mother, out of part of the lands, for her life, then, as to the whole of the lands, to the use of John Hamerton, for his

Hylton, the dispute was between the general creditors, and the daughters claiming their portions under articles subsequent to marriage, which portions were provided for by a limitation to trustees, coming after estates tail to the sons, which had remained unbarred. The relief being against creditors in this case of Ramsden v. Hylton, it would have been a very remarkable case, but that, on the other hand, there appeared to have been an agreement before the marriage, with which the subsequent articles might be coupled. And if a consideration could be found for the articles, the daughters, in that case, were plainly within the extent of that consideration. In Goring v. Nash, and Vernon v. Vernon, there was no pretence of valuable consideration: so that, on the whole, these cases are pretty equally balanced, as to this point, in the weight of their inferences.

(4) 2 Wils. 356.

life, remainder to trustees to support contingent remainders, remainder to the first and every other son in tail male, remainders to Thomas Hamerton, and Vavasor Hamerton, severally, one after the other in tail male; remainder to the daughter and daughters of the marriage of John Hamerton and Mary Kelly; remainder to John Hamerton in fee. There was no issue of the marriage. Afterwards, John Hamerton mortgaged the estate to Monkton, and acknowledged a fine to him *sur concessit:* then Monkton purchased of John Hamerton, for a valuable consideration ‖in fee, and took a fine from him *sur conusance* 147
de droit come ceo. Afterward, John Hamerton died without issue, but Thomas Hamerton, his brother, left a son, Vavasor Hamerton, the lessor of the plaintiff.

Lord C. J. said, that the single question was, whether there was a good and *valuable* consideration to support the limitation in the settlement to Thomas Hamerton, the late father of the lessor of the plaintiff, or whether that limitation was merely voluntary under the statute 27 Eliz. and bad against a purchaser for a valuable consideration. Upon which question he was clearly of opinion, that the settlement was fair and honorable, and that there was a good and *valuable* consideration to support the limitation therein to Thomas Hamerton, the late father of the lessor of the plaintiff, and that it was quite out of the statute of 27 Elizabeth.

The whole according to the Chief Justice, turned upon the mother's joining in the settlement; *that* was a ‖good con- 148
sideration to John the son; the *quantum* was not material; he purchased his wife by his mother's concurrence. As to the objection, that John was seised, and could have made the settlement without the mother, and that in truth no real or good consideration moved from her at all, for that she still had her annuity charged upon part of the lands; it was answered that the application to the mother, shews, that John Hamerton could not have made a settlement, agreeable to the friends of the intended wife, without the mother, and any consideration given by the mother, would make her a purchaser for her younger sons. The Chief Justice added, that it was plain the mother intended her sons should be preferred to the daughters of the marriage, and this was as plain as if he had heard the mother

say, "I will not part with my annuity, secured upon the whole land, and take a security for it upon part of the land, unless you will prefer my sons to your daughters," that the settlement could have no other meaning, and that any consideration, moving from a parent to a child, is good.

149 || The settlement in the case of *Jones* v. *Marsh*, (5) maintained itself against the subsequent mortgagee, upon the strength of the portion which was proved to have been paid by the receipt indorsed upon the back of the deed. But this case also contained an ingredient similar to that which in the above cited case of *Roe* v. *Mitton*, formed the *single* ground of the decision; and the opinion of Lord Chancellor Talbot agrees with that which was pronounced from the bench of the common pleas. "Besides," says his lordship, in this case, "an estate moved from the defendant's father's mother, and she may be considered, in some respects, as a purchaser of the limitations made to her grand-children, so that it would be very hard to call this a voluntary settlement."

The doctrine of *Roe* v. *Mitton*, has been expressly recognized in a late case determined in the court of chancery, (6) which is also a further exemplification of the principle of the rule above attempted to be explained. The circumstances of the case,

150 as to this point, were as follows: A. having || an estate in fee, of £6000 a year in value, and being also tenant for life, without impeachment of waste, of another estate of the annual value of £5000, with the reversion in fee after an estate tail in B. his only son by a former marriage, became greatly indebted, by mortgage, annuities, and otherwise, to the amount of £100,000. A. and B. joined in conveying both estates to trustees, upon trust by sale or mortgage, or by sale of timber, or out of the rents and profits to pay debts, and to apply so much of the rents and profits of what should remain unsold, as they should think proper, as a sinking fund, and to pay the residue to A. and to settle the remaining trust estates, (subject to an annuity of £1000 to B. for the joint lives of him and A.) upon A. for life, without impeachment of waste, with power to lease for twenty-one years only; remainder to trustees to preserve, &c. remainder, (subject to a jointure, to the wife of A. and to por-

(5) Cas. Temp Lord Talb. 64.

(6) Myddleton against Lord Kenyon and others, 2 Ves. Jun. 391.

tions for children,) to the joint appointment of A. and B. and in default thereof to the appointment of B. surviving, and in default thereof to B. in tail ‖male; remainders to the 151 other sons of A. in tail male; remainder to B. in tail general; remainder to the daughters of A. in tail with cross remainders; remainder to B. in fee: with powers of leasing, and full powers of management in the trustees.

On a bill filed by A. to be relieved against this settlement, one of the grounds taken by the counsel for the plaintiff was, the want of consideration; A. having been deceived into a notion of the expediency of his son's co-operation, whereas, in truth, he was perfectly competent, out of the unsettled estate, to effect all the purposes of the arrangement without his son. But that, although the son's joining was no effective accommodation, he, the son, had been a most disproportionate gainer by the transaction, without any sacrifice or concession on his part. But the Lord Chancellor, with great clearness, decided, that as to the alleged want of value to support the settlement, there was no color for that imagination: there was consideration enough ‖to support the deed at law against creditors or purchasers; 152 and there was consideration enough, not only to support the beneficial limitations of the estates to the son, but all the other limitations in which the father was concerned; and his Lordship, in allusion to the case of *Roe* v. *Mitton*, last above cited, observed, that much slighter considerations had been held sufficient in courts of law to support such a settlement, even against the most favored case—that of a fair and honorable purchaser. The consideration, his lordship added, was a consideration of value; the thing parted with, the interest conveyed, the charge undertaken, were all of great and essential value, and would support, to the full extent, all the effects of this settlement, if any attempt were made to question it as void at law.

SECTION VI.

Our reason suggests, that to satisfy this legal exigency of some sort of valuable consideration for the support of settlements and conveyances, there should not only be somebody to whom

the character of purchaser will constructively apply, but there is also need of some estate or interest, out of which the uses, limitations, or provisions may consistently be derived or purchased. In *Roe* v. *Mitton* the son was seised in fee; the consideration moved from the mother; and the limitations, to her youngest sons were purchased out of the estate of the eldest. In the case of *Myddleton* v. Lord *Kenyon*, the settled estate was changed by the recovery into a present fee simple in the father, out of which the son might, with color of reason, be construed to have purchased all the interest in that estate beyond what he could claim before under his father's marriage settlement, by his consent to join in the recovery.

154 ‖The case of *Jenkins* v. *Kemyshe* or *Keymis* is become very important from the frequent references to it in later cases. The fullest report of it is in Levinz (1;) where the circumstances of the case connected with the point in question stood thus upon the special verdict. Sir Nicholas Keymis being tenant for life, with remainder to his son Charles in tail *general*, remainders over, the father and son, on the marriage of the son with Blanche his first wife, and in consideration of the marriage and of £2,500, marriage portion, levied a fine, and suffered a recovery to the use of Sir Nicholas for life, remainder to Charles and the heirs of his body *on Blanche begotten*, remainder to the heirs of the body of Charles, remainder over, with power for Sir Nicholas by deed, to charge all and singular the premises with £2,000; after which Sir Nicholas and Charles, without recital of the power, by lease and release mortgaged part of the lands in fee to David
155 Jenkins to secure the repayment of ‖£2,000 borrowed of the said D. J. with interest at a day mentioned: Sir Nicholas died; Blanche died *without issue (a)*; Sir Charles married a second wife, by whom he had issue the defendant, and died; and the money not being paid, the lessor of the plaintiff, son and heir of David Jenkins, brought ejectment.

First, it was resolved, that the mortgage in fee by lease and release was a bad execution of the power. And as to the second point, it was contended that the settlement was merely voluntary, as to the issue by the second marriage, since the marriage of the

(1) 1 Lev. 150.

(a) The sense of the case requires the insertion of these words.

first wife; and the portion paid with her, could not extend to the issue by the second wife. And it was also contended that there being a proviso in the settlement, giving power to the father to charge the lands with the payment of £2,000 the settlement was void against Jenkins a purchaser for a valuable consideration, under the clause of the statute 27 Eliz. c. 4. which ‖makes 156 conveyances, with power to revoke, alter, or determine at pleasure, void. But the court held that this power (being for a particular sum) was not within the statute; and, according to the report, Hale was of opinion, that the consideration of the marriage and portion might extend to all the estates in the settlement; therefore judgment was given for the defendant.

It is to be observed, that before the recovery was suffered on the marriage of the son, the father was tenant for life, and the son had an estate tail of equal extent with that which he took under the marriage settlement. The limitations under the settlement were no new acquisition of interest to Charles the son, and as to his posterity, it lessened the probability of succession in the issue of a future marriage, for the subsisting estate tail *general* in Charles, supposing no recovery to have been suffered, and only females to have been born of the first marriage, would have carried the estate over to the son by the second marriage in exclusion of the first family. The special tail therefore ‖created by the settlement was the material alteration; but 157 as there was no issue by the first marriage to claim under it, and as, in fact, the person claiming under the new settlement would have been entitled without it, the case does not seem, in this view of it, to fall within the reason of the statute 27 Eliz. c. 4.

It cannot be disputed but that the issue of the first marriage, females as well as males, were prospectively within the consideration. And, if any such had existed, they would have been entitled as purchasers. And, though the limitation under which the defendant claimed, was beyond the actual reach of the marriage consideration; yet, as, in truth, it was no *acquisition* of interest, it would, perhaps, be too much to construe it within the meaning of a statute against fraudulent conveyances. The issue by the second wife, so far from being the object of any voluntary bounty under the settlement, were disposed at greater distance in the line of prospective provision;

and it would seem to be a harsh way of understanding the
158 statute in ||question, if a postponement in the order of succession could be considered as a conveyance or gift with a fraudulent intent. If, indeed, any female issue of the first marriage had been in existence to claim under the limitation in special tail in the settlement, inasmuch as that limitation operated, with respect to the then subsisting estates, as a transfer of interest from the general to the special heirs, it might have been considered as virtually comprehended under the words gift or conveyance in the statute; but, in such a case, it is plain, the limitation would have been sheltered under the valuable consideration of marriage, and the marriage portion.

But if these reasons be thought insufficient, we may return to the rule already discussed. Here was a reciprocal accommodation between the father and the son; the recovery and the objects of the settlement required their concurrence, and, though the father was wholly the gainer by the result, yet we have seen, in the case of *Myddleton* v. *Lord Kenyon*, and in
159 the ||principle of the case of *Roe* v. *Mitton*, that this circumstance is not of any importance. So long as both parties were necessary to each other, and each had something to part with, both were in a predicament to be considered as purchasers of the limitations comprised in the settlement; and here, by the recovery, the recoverer gained a momentary fee, out of which the estates might be drawn by the parties so purchasing from each other.

Since the case of *Roe* v. *Mitton*, the courts, perhaps, have been more disposed to support collateral and remote limitations in marriage settlements by the application of this rule, than by resorting to any notional extension of the consideration of marriage to objects unconnected with its views and motives. Though, perhaps, the legal idea of consideration, from a prevailing inclination to support settlements, has been sometimes carried by partial ingenuity to a degree of minuteness ap-
160 proaching the point of evanescence; ||yet, where analogy and authority will permit, it seems desirable to found the doctrine, as much as may be, on a probable supposition of contract and stipulation.

In the case now under discussion some argument may be

admitted to arise from the *remoteness* of the limitation in question against the presumption of intent to deceive a purchaser; and this was one of the reasons supposed by Lord Macclesfield, in his remarks on that case in *Osgood* v. *Strode*, to have weighed with the court, and it must be owned that this observation seems better founded than what in a line or two before had been advanced by way of reason for the decision, "that there was a fair and honest occasion for making the settlement." For his inference from that position rests upon a postulation which his Lordship perhaps would not himself have granted, viz. that if a settlement be primarily induced by a good motive, all the limitations comprised in it must be good, or in other words, that a settlement cannot ‖be upon good consideration as to 161 one person, and voluntary and bad as to another. *(b)* The argument from remoteness is only strong as the statutory presumption or rule of evidence is weak; and as, at best, it is a doctrine in which the boundary line is but faintly marked, it may be better, as being more sure, to rely upon the rule above attempted to be illustrated, and which has the countenance of recent and great authorities.

SECTION VII.

‖ The case of *White* v. *Stringer* (1) calls for particular 162 attention, as there a limitation in a settlement, to which the consideration of marriage did not extend, was supported, against a subsequent purchaser, though such limitation was not within the reasoning applicable to the order of cases above examined. The case upon the evidence on an ejectment tried at bar was as follows: A father seised in fee, in consideration of a marriage between his eldest son and A. and of a marriage portion to be paid, (which was afterwards paid) made a settlement upon the

(b) This proposition was fully admitted in White v. Stringer, 2 Lev. 106. by the bench; and see the opinion of Ley C. J. 1 Roll. 306. See also Style 428.

(1) 2 Lev. 105.

first son, and the heirs of his body upon A. begotten, remainder to this second son in tail, remainder to his own right
163 ||heir. *(a)* Three years afterwards the father sold the lands for valuable consideration, and died: the son and A. died without issue. And whether the remainder limited to the second son was fraudulent and void as against the purchaser, he having notice of the settlement, and a covenant in his deed of purchase against all incumbrances, save this remainder to the second son, *against which he had taken a collateral security*, was the question.

The relative situation of the parties to this settlement corresponds with what would have been the situation of the parties to the settlement in *Osgood* v. *Strode*, as the case was hypothetically put by the chancellor, when his Lordship observed, that "if old Lawrence the father had the whole estate, he did not see with whom he could contract, except with his son's wife and her friends, which could only make a good consideration for the husband and wife and her issue." In the case now before us, the whole estate moved from the father, and there was no-
164 body to contract with him but the intended wife; the son had nothing to ||part with, and therefore was not in a predicament to be construed a purchaser, so that upon the whole of the case there was no one to stipulate or contract for the second son, or, in other words, to purchase the limitation to him out of the fee simple of the father. As no consideration therefore moved from any body to the father, out of whose estate this collateral *(b)* provision was to come, it must be considered as the result of his spontaneous bounty.

But the case discloses upon an attentive examination some distinguishing circumstances which may reconcile an acquiescence in the support there given to the collateral limitation with

(a) In the report of the case mention is made of the father's being indebted. The fact was unimportant, but perhaps industriously inserted to show, that it had no weight with the court.

(b) To obviate any criticism upon the word collateral, it may not be amiss to observe, that the marriage is the point of reference; and in speaking of limitations in a marriage settlement, they are called either direct or collateral with respect to the husband and wife. It is plain they may be lineal to the settler, though collateral to the marrying parties.

an adherence to the rule above investigated; a rule which seems to establish and preserve a consistency of construction among a great majority of the cases determined as to ||this question 165 upon the statutes. The turn which the argument and decision took in the case before us was as follows: It was contended by Serjeant Maynard, who was counsel for the plaintiff, firstly, that the consideration of the marriage and marriage portion did not extend to the second son, any more than if the father, upon the marriage and for the marriage portion, had settled it to the first son and heirs of his body; and afterwards on the same day had settled the reversion upon the second son in tail, remainder to his right heirs; this second settlement would then have been clearly voluntary and void as to purchasers. Secondly, that though there was notice, and though the settlement was excepted out of the covenant in the deed of purchase, the case was not altered by that circumstance; for a man having notice of a fraudulent deed, may safely purchase, knowing that he cannot be hurt by such a deed.

But Hale C. J. and Wylde J. held clearly, Raynsford agreeing, and Twisden doubting, that, though ||one and the 166 same deed may be upon good consideration as to one, and voluntary as to another, yet, in this case, it could not be imagined that the settler intended to deceive a purchaser after the determination of an estate tail, which might endure for ever *(c)*, when the consideration of the purchase, as well as the remainder itself, by reason of the first estate tail, was of so small a value. Secondly, that the purchaser was ||not deceived in this case, 167

(c) The involved state of this question appears from the different opinions pronounced even by Lord Hale, in the different cases which have come before him, wherein such limitations, as we have been considering, have occurred. In Jenkins v. Keymishe, we have seen him uphold the digressive limitation, by a constructive extension of the marriage consideration, to all the limitations comprised in the deed of settlement. In White v. Stringer, we observe him laying great stress upon the *remoteness* of the limitation in question. But in the case of Roscarrick v. Barton, Chan. Cas. 217. where A. upon his marriage, settled lands upon himself for life; remainder to his intended wife for life; remainders to his first and other sons successively in tail; remainder to B. in tail; Lord Hale, sitting with the Lord Keeper, was of opinion, that the remainder to B was voluntary and fraudulent against a purchaser for valuable consideration.

for he not only had notice, but also a collateral security against this remainder.

With respect to this case of *White* v. *Stringer*, we may perceive that it contains two peculiarities, which materially distinguish it in principle from the preceding cases—the *collateral security* taken, and the *inadequacy of the price given*, by the purchaser. Since the statute has not made a fraudulent conveyance a simple nullity, but has only empowered a subsequent purchaser for valuable consideration, to treat it as void; it should seem that such purchaser is within the application of that maxim, which says, that every man may renounce a law which was made for his own benefit; and by resorting to a collateral security, against a former voluntary conveyance or limitation, does not such purchaser disavow his reliance on the statute, and *tacitly affirm that*, which the statute enabled him to consider as void? Perhaps, too, when accompanied by circumstances, such as those by which this case of *White* v. *Stringer* is characterized,

168 ‖the fact of *notice* to the purchaser, though always inoperative when standing alone, imbibes a hurtful efficacy from the base intermixture of fraud. The reason of its operating no disqualification as to a purchaser, after a voluntary conveyance, rests, as it seems, on the supposition, that he regarded the former alienation as void against himself, and therefore saw nothing in it to deter him from the completion of his purchase; but does not this supposition fail, if such purchaser impliedly confesses, by his resort to a collateral security, an apprehension of the validity of the first conveyance? On the other hand, can the *offer* of a collateral security, in fairness of reasoning, consist with an intent to deceive a purchaser, and if the security be proportionate, what advantage can the settler propose to himself by the contrivance; The purchaser, too, can have no right to complain, if he bought with a full knowledge of circumstances, and with the liberty of stipulating the terms of his own indemnity. But if we couple with the collateral security the smallness of the consideration, which, as appears from the

169 ‖observation of the Chief Justice, was given, in the case before us, for the settled lands, the integrity of the transaction becomes very questionable on the part of the purchaser. Being doubtful, as it should seem, whether the settlement on

the second son could be maintained or not, he gave a small consideration for the chance of overturning it, at the same time demanding a collateral security, as an eventual protection. It seems in reality, to have been a sort of experiment, and to savor more of champerty, than a fair and genuine purchase. It probably seemed to the purchaser, that the title was a litigious one, and whether he judged rightly or not, he forfeited his claim to the patronage of the statute, by his subtle endeavor to draw support from it to a mere speculating bargain.

The construction of the statute, as to the purity of conduct necessary to entitle a purchaser to its protection, has been very uniform, from the case of *Upton* v. *Basset*, (2) which was determined at the distance of ten years after the passing of the statute, to the case of *Doe* v. *Routledge*, determined by the
170 ||late Chief Justice. All the resolutions, as to this point, unite in the proposition, that the purchaser's case must be clear from every thing of an indirect, collusive, or colorable appearance.

In the said case of *Upton* v. *Basset*, it was said by Anderson, that a *petty* consideration, as a gross sum of £500 given for lands worth £500 per annum, will not entitle a purchaser to the assistance of the statute, for no one shall have the benefit of this statute, unless he comes to the land upon good consideration, and without any *indirect* means. In *Doe* v. *Routledge*, the great disproportion of the purchase money to the worth of the land, was considered by Lord Mansfield as indicating a palpable contrivance. In the case of *Jennings v. Selleck*, (3) the reader may see an instance of relief granted by the court of chancery against a purchaser for valuable consideration, who, having notice of a prior voluntary conveyance, had taken a *collateral security;* and the relief, as to this point, after the court had resolved that the lease by the father ||was de- 171 signed as an advancement to the daughter, appears to have been singly grounded on this fact in the case. But when *notice*, *collateral security*, and *inadequacy of consideration*, concur against the purchaser, after a precedent voluntary conveyance, as in this case of *White* v. *Stringer*, it seems better to rest the

(2) Cro. Eliz. 444. and see the case related by Anderson C. J. 3 Rep. 83. b.
(3) 1 Vern. 467.

support of the prior alienee wholly upon these facts, than to stir delicate questions by indecisive observations, which unsettle the student, and leave the result of the case ambiguous.

There are many remaining points of difficulty to be attended to on the subject of the marriage consideration, and the circuit its influence embraces. We observe in the case of *Beverly* v. *Gatacre*, (4) that the great point with the judges was, whether the lease conveyed to trustees, upon the marriage of A., in trust that A. should receive the rents and profits during his life, and then the wife, and then the issue male of the marriage, could be avoided by the subsequent vendee of the husband *during* 172 *his life*. We are to observe, ‖that it was only upon the statute 27 Eliz. that the purchaser could prosecute at law for the recovery of the legal estate; for if the settlement, as to the estate of the husband, was not avoided by that statute, the legal estate was in the trustees, and the husband's second conveyance being a transfer only of the beneficial interest, the purchaser's resort must have been to a court of equity. But the conveyance to the purchaser would clearly have carried the legal estate as long as the husband lived, if the settlement could have been avoided during his life by the operation of the statute. It is difficult, however, to conceive, where no secret trust can be inferred or supposed, upon what principle of sound construction, a person, who having the dominion of the whole estate, makes a partial disposition of it upon his marriage, by provisions out of it for his future wife, and the posterity of the intended marriage, (provisions clearly supported by valuable consideration) and reserves, by the limitation or declaration of an use or a trust, an interest in himself for his own life, can be considered, as to 173 such life interest, as ‖within the reason or remedy of a statute, made for annulling fraudulent conveyances as against subsequent purchasers for value.

We are now upon the cases where the question upon the statute is, whether a deed is fraudulent or not from the mere want of consideration, as against a purchaser for value, and not upon those cases wherein the inference of fraud arises from the very secrecy of the trust itself, and its inconsistency with the

(4) 1 Roll. 305. cited in 3 Keb. 6. by the name of Lydall v. Vanloe.

visible purpose of the voluntary conveyance. And as to the circumstance of the husband's being in possession, and the reputed owner, which is noticed in the case above mentioned, it should be remembered that, wherever the trust itself can be supported, it would be an absurdity to construe possession, according to that trust, as a badge of fraud; for possession is no further an indication of fraud, than as it raises the presumption of a secret trust, by contradicting the avowed intention of a pretended transfer of property. It seems, upon the whole, a little extraordinary, that the validity of the husband's life interest could be drawn into controversy ‖upon the construction of the statute 27 174 Eliz. since it appears, that the trust was avowed and ostensible, the possession correspondent to the trust, and the interest of the husband no alteration of property, on which the question, whether voluntary or valuable, could properly arise. And it can hardly be doubted, but that, if a third person had settled the estate, instead of the husband, the trust for the husband's benefit would have been protected against a subsequent sale by the grantor, by the consideration of the marriage and the marriage portion (*d*).

SECTION VIII.

‖ If we consider the case of a settlement by the owner of 175 a real estate upon his marriage, whereby the usual strict uses are limited to the husband, wife, and issue, with an ultimate limitation to the right heirs of the grantor, there seems

(*d*) There are many cases which turn upon the doctrine that the wife and her friends are purchasers, by the marriage, of a general interest in the husband's life estate, limited to him by the settlement; for she marries in expectation of the mainte nance and comfort she is to derive out of it. It is in this character of a valuable purchaser, with which the wife is invested, at least in equity, that she attracts the relief of that court against the clandestine agreement of the husband, entered into by him, previously to the marriage, to the prejudice of his life estate under the settlement. See the case of Roberts v. Roberts, 3 P. Wms. 65. edit. Coxe; and the case of Neville v. Wilkinson, in the note to that case; and it seems clear that an action, upon such an agreement, could not now be sustained in a court of common law. Vid. the cases of Montefiori v. Montefiori, 1 Black. Rep. 363. Jackson v. Duchaire, 3 T. R. 551.

hardly a necessity for argument, to shew, that a person claiming this ultimate estate, as right heir of the grantor, takes nothing which can be the subject of dispute upon the statute 27 Eliz. It is a positive rule of law, that no man can raise a fee simple to his own right heirs, by the name of heirs, as *purchasers*, either by conveyance of land, or by use, or by devise. (1) Notwithstanding such conveyance, limitation, or devise, the heir will still take by *descent*, and will, in consequence, be quite out of the reason and contemplation of these statutes of Elizabeth.

Nor is it of importance, as to this point, whether the grantor
176 limits an use to himself for life, or not; wherever a man ‖is seised of the whole legal and beneficial estate, and makes a conveyance for particular estates, uses, or trusts, whatever he does not part with remains in him, and if he limits, by *expression*, a remainder to his right heirs, such limitation takes no effect, but the reversion abides with the grantor, and the express estate is supplied by one, the same in quantity, though different in quality. (2)

It is true that by way of *use*, a man may limit an estate to his *special* heirs, so as to make them *purchasers*; but that can only be where no freehold, either by expression or implication, takes place in the grantor, with which the subsequent limitation to his special heirs can coalesce.* Thus (3) A. on his intended marriage, settled lands by deed and fine, to the use of himself and his heirs till the marriage, and afterwards to the use of his wife for life, remainder to the use of the conusees in the fine and their heirs during the life of A. upon trust to permit him to receive the rents and profits, remainder to the sons of the marriage

(1) Hob. 30. (2) 10 Rep. 81. 1 Ld. Raym. 525.
(3) Tippin v. Cosin, Carth. 272.

* The alteration which destroys contingent remainders, must amount to an alteration in the *quantity* and not in the quality. 2 Cruise 360, 361. Harrison v. Belsay, Raym. R. 413. In this case lands were settled to the use of P. & S. his daughters, for their lives, remainder to the use of the first, and other sons of S. in tail, remainder to her daughters, remainder to the heirs of P; S. afterwards, and before a son was born, by deed released all her right and estate to the use of P. and his heirs.

Held—that this release from one joint tenant to another for life, did not destroy the contingent remainder to the first son of S. Lane v. Pannell, 2 Cruise 341; 1 Roll's R. 238, 317; Watkins 114, 171, 191; Doug. 772.

successively ||in tail, male, and for want of such issue *to the heirs of* the body of the said A. and for want of such issue to the said A. and his heirs. The marriage took effect, and they had issue only one daughter, married afterwards to G. T. who likewise had issue by the said marriage one daughter, the lessor of the plaintiff. A the father, upon some displeasure at the marriage, levied another fine, with proclamations to the use of the defendant C. and his heirs. The wife of G. T. died, then her father died without any other issue, and the widow entered and enjoyed the land during her life, and died. And the question was, whether the daughter of G. T. the grand-daughter of the grantor, was barred by the last fine; which question depended upon a previous question, whether A. took an estate tail vested in himself by the limitation to the heirs of the body, or that limitation to the heirs of the body was a contingent remainder, which the heir should take by purchase, and not by descent. If she took by purchase, the last fine was clearly no bar. It was determined that the express estate given to the conusees in the first fine, during the life of the settler, left ||no room 178 for the implication of a resulting use to the grantor, with which the limitation to the heirs of the body could unite. But that the limitation was a new estate, i. e. an estate tail, and could be no part of the old estate, which was a fee simple. It was adjudged therefore to be a contingent remainder, which after the grandfather's death, vested in the lessor of the plaintiff by purchase, and consequently was not barred by the fine.

Now, as the foregoing case was circumstanced, no doubt could arise as to the validity of the remainder in question, upon the statute 27 Eliz. for it does not appear that there was a valuable consideration for the conveyance to C. and if such consideration had existed, yet the grand-daughter was protected by the marriage and marriage portion. But if we suppose a valuable consideration for the conveyance to C. and no issue by the marriage on which the settlement was made, but the claim to have been made by the heir of the body of the grandfather by a second venter, then the ||question whether fraudulent 179 or not within the above mentioned statute might perhaps arise.

The case last supposed must evidently rest upon a different

foundation from that of *Jenkins* v. *Keymishe*, where the reciprocity of interest in the father and son (the father being tenant for life, and the son having the remainder in tail) put both of them in a condition, according to the reasoning in a former part of this essay, to become purchasers of all the limitations in the settlement, whether collateral or lineal to the intended husband. But, as before remarked, when the *whole* estate moves from the the husband, out of which the ulterior limitations are to be drawn, there is nothing but the consideration of the marriage and marriage portion to resort to; and it is difficult to support the efficacy of the consideration of the marriage and portion to the extent of including within its expansion, any limitation which lies *wholly* out of the path of the new generation, and the prospects of the future family.

180 || But we should observe, that a limitation to the heirs of the body of the husband, as in the case above hypothetically stated, is not *wholly* out of the line of the posterity of the first marriage; for though by the course of events it may happen, that a son or daughter, by a second marriage, may claim under such a limitation; yet the limitation to the heirs of the body being preceded only by strict limitations to the wife and sons of the marriage, would comprehend the female issue of the first marriage and would so far be clearly supported by a valuable consideration; and, although, according to the opinion of Ley, C. J. in the above cited case of *Beverly* v. *Gatacre*, the operation of the statute may affect one limitation, cease as to a succeding one, and return and attach upon others more remote, yet such an intermittent operation with respect to different limitations in the same *settlement* will not support an inference of such divisibility of effect on the same *limitation* in a settlement, as such limitation prospectively regards those who *are* and those who are

181 *not* ||within the consideration of the marriage. Such a doctrine attracts the full weight of the argument from the absurdity of making a transaction fraudulent *ex post facto*, and by relation; for here it would not be a *petitio principii* to suppose the limitation good at the time of making it, since the evidence of subsequent facts could not in this case be coupled with the original act, so as to warrant the construction of a primary

fraudulent intent: but the *original* act standing clear from all ambiguity, and being grounded on a plain consideration of value, could by no sort of artificial reasoning that did not include a contradiction in sense and terms, be brought within the statute by presumptive construction of fraudulent intent.

The limitations in the case of *Jenkins* v. *Kemishe*, we have observed, might derive their value from the reciprocity of situation in the father and son, which gave them a capacity of contracting for the collateral limitations in the settlement; but if in *that* case the whole fee simple had been in the *husband*, and all the ‖estates had moved from *him*, supposing the limi- 182
tations to stand as they did, (except an express limiting away of the use during the grantor's life, as in *Tippin* v. *Cosin*, so as to prevent a vested entail in the husband by a conjunction of estates,) it seems that the limitation to the heirs of the body of the husband would have been *wholly* beyond the compass of the marriage consideration, as plainly including none of the objects of the first marriage: for in that case the preceding limitation to the issue *generally* by the first wife engrossed all the objects of *that* union, so as to exclude the supposition of any motive for making the ulterior limitation to which the consideration of the first marriage could lend support. If we take up the case thus circumstanced, and further suppose it to contain an ultimate limitation to the right heirs of the husband, this is only, as has been already observed, a part of the old fee simple, and therefore wholly out of the question as to any of the statutes of fraudulent conveyances.

But the case presents another aspect and different ‖consc- 183
quences, if we suppose the whole estate in the lands to move from a third person, for then a limitation to the right heirs of the husband, after limitations to all the issue of the marriage, is creative of a new estate beyond the bounds of the marriage consideration, and, as it should seem, *in*supportable against a subsquent vendee of the grantor. But yet, where the preceding limitations do not comprize *all* the issue of the marriage, as where provision is only made for the *male* posterity, the principle of construction, for which some arguments have before been offered, seems to bring such ultimate limitation to the right heirs of the husband within the influence of the marriage consideration as

being a denomination under which the female progeny are comprized (4). *

To pursue this train of observations a little further, let us suppose a third person to make the settlement, with a limitation, after estates tail to the issue of the marriage in the usual form, to the right heirs of the husband, but without giving any estate of freehold to the husband to which such ultimate limitation
184 could ||be joined, as in *Sir Thomas Tipping's* case (5); where, upon a marriage, a settlement was made by a third person to the use of the husband for ninety-nine years, remainder to trustees during the life of the husband to support contingent remainders, remainder to the wife for life, remainder to the first and other sons of the marriage, remainder to the heirs of the body of the husband, remainder to the right heirs of the husband. In this case of *Sir Thomas Tipping*, the remainder to the heirs of the husband was plainly contingent, the estate not moving from the husband, and he having no freehold into which such limitation to his heirs could be incorporated. There the trustees having joined to bar the ulterior remainders, the Court of Chancery refused to punish them for a breach of trust, at the instance of the right heir, whom they considered as a *purchaser* in a sense contradistinguishd from a taking by *descent*, but as wholly a *volunteer* as to every purpose of relief in that court. If the settlement in that case had rested on articles, and the court
185 had been ||called upon by the right heir of the husband to compel a specific performance by the heir of the grantor, the cases determined upon this subject would not justify an expectation that the court would lend its assistance; for they shew

(4) Vide 9 Mod. 160, Neeve and others v. Keck.

(5) Cited 2 P. Wms. 358. This case is also reported by Gilbert, p. 34. under the title of Tipping v. Pigot, at the end of which the learned reporter, adds a doubt, which it has been one of the objects of the foregoing pages to resolve.

*Equity views a provision for a child as good a consideration as it does a provision for a wife, even though made after marriage, and by a voluntary bond to settle a jointure on her, and settling lands accordingly—but *secus* as to a *collateral relative* but in very special cases. Bellingham v. Lowther, 1 Ch. Ca. 443.

A remainder to a brother in tail, even in marriage articles, is not a consideration in equity, but there may be some consideration in the articles or contract to entitle. Trevor v. Trevor, 1 P. W. 631; Randall v. Willis 5 Ves. jr. 273, 276.

that the favor of that court decreases in the ratio of the remoteness of the limitation, and this was in truth the great argument in defence of the trustees in this case of *Sir Thomas Tipping*, where the limitation was more remote than in any of the cases cited in a former part of this essay, as examples of articles decreed in favor of collaterals. Now, if instead of articles, we suppose an actual conveyance as the foundation of the settlement in a case circumstanced like this of *Sir Thomas Tipping*, and that the estate had subsequently been sold by the grantor to a purchaser for valuable consideration; and that the husband had afterwards died without issue; what decision must have been made by a court of law, as between the right heir of the husband, and the grantor's vendee? The limitation would be voluntary beyond the reach of dispute. If we say with the court in the case of ‖ *White* v. *Stringer*, above cited, it may 186 be voluntary, but it cannot be presumed fraudulent against a purchaser, because it was very remote; occasion is given to a remark that the same fact branches into opposite deductions, and by consequence, that the principles of justice are diverse, on the opposite sides of Westminster Hall; that if you resort to one judicature, the remoteness of the limitation on which you rely is a title to protection and support, while this very same remoteness of your claim renders the other deaf to your application.

CHAPTER III.

SECTION I.

The valuable consideration of matrimony which falls short of these remote limitations in settlements *before* marriage is *wholly* wanting to settlements made *after* marriage. It has been observed, however, in an early part of this essay, that a family settlement, though made *after* marriage, if the settler was unincumbered at the time of making it, has generally been supported against the claims of creditors under the statute 13 Eliz. c. 5.

But the statute 27 Eliz. for the protection of purchasers, has been considered as more severe against voluntary settlements, and as calling for less equivocal tests of honest intention; and this difference which has been taken as to the operation of
188 these statutes, it ‖may be here observed, is another instance of the principle which has governed the construction of them in courts of judicature. For if in questions upon these statutes the decision hung upon the circumstantial evidence of actual fraud, what sense could there be in the distinction between the cases of a creditor and a purchaser? *substantia non recipit majus aut minus.* Fraud does not swell and contract its proportions with the varying magnitude of the object, nor can its existence be more or less presumable, in common reason, according to the degrees of inconvenience and loss occasioned by the act which gives rise to the suspicion. It would be strange to maintain that the favor which the law bears towards purchasers could induce a logical inference of fraud where *they* were concerned, which would not arise where interests less guarded were danger.

If we look to the *preventive* efficacy of these statutes, and regard their provisions as having in view the radical overthrow of fraudulent artifices, by requiring such circumstances to char-
189 acterize an honest ‖act as only honest intention can assume, or in other words, by placing parties under a *disability* to commit fraud, we shall see wisdom in that violent construction, which, according to the moral rule *necis artifices arte perire sua,*

converts ambiguity into evidence of what is meant to disguise, and erects, on a foundation of common experience, a sort of artificial presumption of fraudulent intentions from equivocal transactions.* In this view, we shall, perhaps, see no absurdity in the language of ancient books, wherein certain transactions are said to be '*intended* and *presumed* to be made with intent to deceive purchasers,' or 'to be fraudulent in *judgment of law*' (1) or where, with bolder expression, it was said in the before cited case of *Beverly* v. *Gatacre* (2,) that the question for the court was, whether, there being no fraud at first, there was not *fraud in law* afterwards against a purchaser. Such artificial presumption (for such, perhaps, may those presumptions be called, which are not the result of moral reason applied to the particular circumstances of a case, but receive their strength from positive law) being the ‖creature of civil authority, may be 190 adapted to the exigencies of society, so as, it should seem, more readily to arise in one case than another, according as interests, more or less cherished by the law, are affected, without reference to any complexional diversities in the facts on which the question of fraud arises. Not that it is here intended to be maintained, that this presumption is wholly dependent for its existence upon the favor with which the interests endangered are regarded by the law. The proposition must be understood only to mean, that where two cases are parallel as to the circumstances indicating the intent, the presumption of fraud will *sooner* arise in behalf of a purchaser, than of an interest less anxiously protected by the law. And although these statutes act wholly by presumption, so as in most cases to dispense with the necessity of actual proof, yet we are not to suppose that such presumption of law is always an inflexible rule of construction precluding denial, however true it may be, that under certain circumstances, which it ‖is the endeavor of this treatise 191 to distinguish and ascertain, the inference of fraud under these statutes may become so plenary and incontrolable as to rank among those violent presumptions of law which will not endure contradiction.

(1) Vid. Burrel's Case, 6 Rep. 72 b. (2) 1 Roll. 305.

*3 J. C. R. 481.

Family settlements made *after* marriage, where no circumstances of distinction, such as will hereafter be noticed, vary their construction, are fraudulent against subsequent purchasers; although against *creditors*, whose demands have *subsequently* arisen, such settlements have been generally supported.

Woodie's case, cited in *Colvile* v. *Parker*, (3) is an early instance of this rule of construction; where a husband, after marriage, voluntarily assigned a lease by way of a jointure for his wife, and took the profits and afterwards sold it to a purchaser for a valuable consideration; and it was adjudged to be within the statute 27 Eliz. though at first it was not
192 made upon any ||trust to be revoked, nor contained any clause with such effect; but (in the words of the person citing the case) because it was a voluntary conveyance at first, it was intended fraudulent at the beginning. The case of *Douglass* v. *Ward*, may be produced as an instance of the rule of construction, which has brought settlements after marriage within the sense of fraudulent under the statute 27 Eliz. It must be owned, indeed, that the court of chancery seemed in that case to stretch the operation of the statute with undue severity; for the decree went so far as to vacate the first settlement as to a part of the settled estate, which did not appear to have been subjected by the second settlement to the wife's jointure; in doing which they appear to have neglected the rule which has since prevailed of limiting the extent of the avoidance to the demands of the interest to be protected. In the case of *Lavender* v. *Blackstone*, (4) the settlement, which was made after the marriage, was regarded as purely voluntary, and therefore fraudulent against a subsequent mortgagee: in which case a
193 provision for ||payment of debts, which was ostensibly the principal object of the transaction, and which, if made *bona fide*, might, under some circumstances, have imparted support to the settlement, turned wholly to its prejudice by being coupled with an inconsistent possession and exercise of ownership by the grantor.

(3) Cro. Jac. 158.

(4) 2 Lev. 146.

In another case (5) by articles made between Sir R. S. and the plaintiffs, reciting that Sir R. S. was seized of the manors of H. and A. wherein were supposed to be several rakes, veins, pipes, and flats of lead ore; and that Sir R. S. was minded to take the plaintiffs to be partners with him in managing all mines to be discovered in the soil of the said manors, it was agreed, that the said Sir R. S. and the plaintiffs should become partners together for 21 years in certain proportions, according to which Sir R. S. was to have an advantage in consideration of his ownership in the soil; and valuable mines having been discovered and worked, and Sir R. S, being dead, the plaintiffs brought their bill against the son and widow to have the benefit ‖of the agreement. The defendant set up a settle- 194
ment by Sir R. S. of his estate made after marriage; and according to the report, the court took time to consider of it, but inclined to decree for the plaintiffs as being in the nature of purchasers, and because all voluntary conveyances were void, as against purchasers by the statute 27 Eliz. c. 4.

So in a case reported in Tothill's Transactions (6), where the plaintiff bought land of the defendant, which the defendant had previously conveyed to the use of himself, his wife, and son, it was decreed, that the plaintiff should have the land against all.

The case of *Taylor* v. *Jones* (7) was briefly thus. A husband, to whom £1,733 stock was devised after his marriage, vested the same in trustees, for the benefit of himself for life, of his wife for life, and afterwards for the benefit of his children; and a bill was brought by his simple contract creditors, to obtain a ‖decree for the payment of their debts out of the said 195
stock. The case is loosely reported, but we collect from it that there were creditors upon demands arising both before and after the settlement of this stock, and that the principal question was, whether the debts contracted after the settlement were within the statute 13 Elic. c. 5. It appeared to the master of the Rolls that the word 'others' seemed to be inserted in the preamble of that statute to take in all manner of persons, as well creditors *after* as *before* the settlement, whose debts should be defrauded. And the enacting clause, he observed was still strong-

(5) 2 Vern. 226. (6) Tothill, 125. (7).2 Atk. 600.

er, because the word *creditors* was not mentioned, but the general words 'person or persons.' The settlement therefore was decreed to be void, both as against creditors, whose debts arose antecedent, and those whose debts were subsequent to the settlement. And if such a settlement was void as to creditors, we may safely conclude, that it would have been held void as against purchasers, who are not only the principal favorites of the
196 law, but for whose protection, according to the ||best opinions a stronger express provision has been made by the statute 27 Eliz. than by the 13th of the same Queen has been made for the protection of creditors, and the other objects of that Act.

The trust, declared by this settlement, for the husband, and his continuance in possession, were circumstances insisted upon by the Master of the Rolls as indications of fraud; but as they do not appear at all necessary to ground the decision of the court, there is the less reason for scrupling to question the accuracy of the observation.

Where the principal facts are fully sufficient to ground the judgment, it may sometimes be of inconvenient tendency to bring in all the accompanying circumstances of the case as accessory proofs of the frandulent intent. Subordinate circumstances thus adverted to only as corroborative evidence, have sometimes been but hastily viewed: and though the observations upon them
197 may not prejudice a case, wherein ||the settlement or conveyance is clearly void on other grounds, yet they are apt to leave in the mind of the reader a confused apprehension of a point, which in some other case may happen to constitute the single subject for adjudication.

It would be too much to construe a trust, which is agreeable to the express intent of a transaction appearing upon the face of the deed, and which is consonant to the usual method of framing family settlements, a *fraudulent* trust, to deceive either creditors or purchasers; and it seems clear, that *possession*, agreeing with such express trust, cannot be construed but according as such trust is construed. Thus, so long ago, as in the case cited by Tanfield, J. in *Calvile* v. *Parker*, (8) it was said that if the husband had made an assignment of the lease to his wife's friends,

(8) Cro. Jac. 158.

in consideration of a portion, and had afterwards taken the profits thereof, *as in reason he ought during his life*, and then had sold the term, it would not have been within the statute. This point has been cleared up by the case of ‖*Cadogon* v. *Kennet*, (9), a case deserving great attention, not only as being illustrative of this important distinction between the different characters of trusts, but as tacitly disclosing the opinion of the court, that a fraudulent trust, for the husband, would have vacated the *whole* settlement, as far as it regarded the subject of of that trust, although the subsequent provisions were within the marriage consideration. 198

The single point, in that case of *Cadogan* v. *Kennet*, was, the imputed fraudulency of the trust *for*, and possession *by* the husband, and as the entire property in the goods taken in execution on the *fieri facias* was in dispute, it appears that this was a circumstance of fraud, admitted capable, if substantiated, of subjecting every thing included under that trust, notwithstanding the validity of the subsequent trusts considered by themselves, to the claims of the judgment creditors. The trust for the husband in the case of *Beverly* v. *Gatacre*, was not charged with any positive fraud as a trust; and this occasioned the remark of Doderidge, J. ‖that he did not see how a trust, admitted to be 199 without fraud at the beginning, could become fraudulent by consequence. But the question, in that case, seems to have been, whether the conveyance to the trustees, as far as respected the benefit the husband was to receive, was not *voluntary*, and therefore to be *construed* fraudulent under the statute 27 Eliz. c. 4. The doubt, therefore, only affected the husband's life interest. There seems, indeed, to be a clear difference between an open trust, such as that which was declared in *Beverly* v. *Gatacre* for the husband, and which brings so much of a settlement as is contained under it within the statute, by showing it to be voluntary, and that *secret* trust which is presumed from a contradictory possession; for in this latter case the secrecy and inconsistency are circumstances of general fraud, which, where it occurs, infects the whole transaction. The objection grounded on the possession of the husband in *Cadogan* v. *Kennet*, and *Taylor* v. *Jones*,

(9 Cowp. 432.

was capable of being answered by shewing that such pos-
200 session was ‖consistent with the ostensible trust, and where it is consistent with the ostensible and avowed trust, the question is bounded to the effect of such trust; which in *Cadogan* v. *Kennet*, was held to be fair and honest, and agreeable to the nature and course of settlements. But if the trust had been *evidenced* by the possession, and the *possession* had been contrarient to the visible purpose of the settlement (10), such secrecy and duplicity would have been evidence of fraud to impeach the *whole* transaction. In *Taylor* v. *Jones* all the trusts were voluntary, or rather indications of a voluntary conveyance, being created *after* marriage, but there no secret trusts could be implied from the possession of the husband, which was correspondent to the voluntary settlement. In *Cadogan* v. *Kennet*, the settlement was *upon* marriage, and therefore not voluntary, and there being nothing contradictory in the possession by the husband, the possession was an innocent ingredient in the case, where the only question ought to have been, whether the trust declared for the husband brought the case within the statute, as to so much of the
201 settlement as ‖fell within that trust. Such was the question in *Beverly* v. *Gatacre*: and the point was well settled by the reasoning of Lord Mansfield in *Cadogan* v. *Kennet*. In *Taylor* v. *Jones*, the whole settlement was voluntary and void, and the emphatic words of the Master of the Rolls are worthy of remembrance: "It is upon these reasons that I must decree for the plaintiffs, the creditors, against the wife and children; for though I have always great compassion for a wife and children, yet, on the other side, it is possible, if creditors should not have their debts, that *their* wives and children may be reduced to want."*(a)*

(10) Haselington v. Gill, T. R. 620. note a.

(a) By the comments of the chancellor in Dundas v. Dutens, 1 Ves. Jun. 196. the reader will perceive that the relief in Taylor v. Jones stands on rather questionable grounds. In the case above alluded to, the chancellor was of opinion, that stock was not liable to creditors, and could not be touched, in equity, any more than on a *fieri facias*. But see Horn v. Horn, Ambl. 79. where it seemed that if the plaintiff had not taken out the Ca. Sa. the bill would have been proper to subject the stock in the hands of the trustees: and see the case of King v. Dupine, Reg. lib. A. 1744. fol. 91.

‖ *Goodright*, on the demise of *Humphreys* (11) and others, against *Moses*, came before the court in the form of a special case, which was as follows: In December 1709, Dorothy Curlew, in consideration of an intended marriage between herself and Joshua Reade, settled the premises in question, from and after the said marriage, to the use of herself for ninety-nine years, if she so long lived, without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to herself for life, remainder to the said Joshua Reade for life, remainder to the first and other sons of the intended marriage in tail, remainder to the daughters in tail, remainder to such person or persons as the said Dorothy, whether covert or sole, should, by deed or will, appoint; remainder to the said Dorothy in tail, remainder to her right heirs. The marriage took effect, and the said Dorothy died, leaving her husband, Joshua Reade, and only one child, Elizabeth, surviving her; which Elizabeth became afterwards the wife of Thomas Harris. In January 1747, the said Joshua Reade, Thomas Harris, ‖and Elizabeth his 203 wife, levied a fine, the uses of which were declared to Walter Grant and Joseph Humphreys, and their heirs, in trust as to the rents and profits to and for the said Joshua Reade for life; and after his decease, in order that the same rents and profits might be applied to the support of the said Thomas Harris and Elizabeth and their children, during the life of the said Thomas Harris; and after his decease for the maintainance of the said Elizabeth Harris, and her children, during the life of the said Elizabeth; and after their several deceases, that the trustees should, by sale or mortgage, raise a sum not exceeding £100 for the younger children of the said Thomas and Elizabeth, (exclusive of the right heirs of the said Elizabeth, on account of the subsequent limitation of the surplus to their use); and after raising the same, to convey the residue and remainder of the premises to the right heirs of the said Elizabeth for ever. Thomas Harris survived Joshua Reade, and Elizabeth Harris survived her said husband Thomas Harris. In July 1759, Elizabeth Harris demised the ‖premises to the defendant, Thomas Moses, for 204 twenty-one years, who, accordingly, entered and took

(11) 2 Blackstone, 1019.

possession, and laid out £100 in repairing the premises. In December 1771 Elizabeth Harris died, and in May 1772, Joseph Humphreys, the surviving trustee, Thomas Harris, eldest son and heir of the said Elizabeth Harris, and all the younger children of the said Elizabeth, in consideration of £2,150 conveyed all the premises in question to J. B. and his heirs. And the question being, whether, under these circumstances, the plaintiff could recover; the opinion of the court, as delivered by De Grey, C. J. was, first, that the deed of 1747 was only a voluntary conveyance, within the true meaning of the statute 27 Eliz. being founded only upon a good, and not a valuable consideration, and therefore could not be set up against a *bona fide* purchaser. Secondly, that the defendant, being a lessee at *rack rent*, was a *bona fide* purchaser of his term for a valuable consideration.

SECTION II.

205 ‖ The voluntary settlement, in this case of *Goodright* v. *Moses*, being grounded upon a fine, some thoughts are naturally suggested by it, on the manner in which this statute of Elizabeth operates, with respect to these assurances upon record. It is considered in *Fermor's* case(1) that a fine, levied to secret uses to deceive a purchaser, may be avoided by an averment of fraud against it, upon the statute 27 Eliz. c. 4. In *Fitz-James* v. *Moys* (2) and in *Leach* v. *Dean*, (3) which were cases of recoveries, suffered to voluntary uses, the effect given to the statute was only that of avoiding the deeds declaring the uses, while
206 the recoveries themselves were left to their accustomed ‖operation. And there seems to be no reason for considering fines and recoveries *(a)* under distinct points of view, as to this

(1) 3 Rep. 79. et. vid. Jenk. 254. pl. 45. (2) 1 Sid. 133. (3) 1 Ch. R. 78.

(a) Common recoveries are within the express saving of the statute 13 Eliz. c. 5. but they are saved only as *common recoveries*; no particular exemption is designed to be given to them as *conveyances* from the general operation of the statute. And at *common law*, in case of recovery by default, *fraud* might be *generally* averred. Plowd. 47.

subject of inquiry. It may tend, in a great degree, to reconcile any apparent discordance in the books, on this head, if we consider the assurances themselves, or the limitations of uses upon them, as avoidable under these statutes, according as the interests to be protected require the one or the other effect. Where a tenant in tail in possession levies a fine, as in *Lavender* v. *Blackstone*, or suffers a recovery, as in *Fitz-James* v. *Moys*, and *Leach* v. *Dean*, above cited, for a voluntary and fraudulent purpose, within the statute, there appears to be no reason for any avoidance or disturbance of the assurances themselves: a more beneficial operation will be given to the statute, in such cases, if the fine or recovery be construed to ‖enure to the benefit of the purchaser, according to the 207 extent of his interest or claim, and only so much or so many of the former uses, as are inconsistent with this object, to be revoked and annulled. The second conveyance may be considered as a new and effectual declaration of an use by the recoveree or conusor. So also, where a tenant of the freehold, and a person having the next vested remainder in tail, join in suffering a recovery, or, as in the case just considered, of *Goodright* v. *Moses*, in levying a fine, and declare voluntary uses upon it, it appears that the statute may effectuate its object, by making void so much of the declaration of uses as is repugnant to the interest which is purchased by the valuable consideration, and by supporting that interest as taking effect by a fresh constructive limitation of an use by the tenant in tail, who, to this purpose, is seised of an estate in fee simple, by the resultancy of the former inefficient use. And this reasoning corresponds with the rule in *Beckwith's* case, (4) where it was resolved that "if A. tenant for life, ‖and B. in reversion or 208 remainder, levy a fine *generally*, the use shall be to A. for life, the reversion or remainder to B. in fee, for each grants that which he may lawfully grant, and each shall have the use which the law vests in them, according to the estates which they convey over." In the above cited case of *Goodright* v. *Moses*, Joshua Reade, who was tenant for life, and Elizabeth Harris, in whom both the remainder in tail and the reversion in fee were vested,

(4) 2 Rep. 58.

by virtue of the marriage settlement of Dorothy, her mother, together with Thomas Harris, the husband of Elizabeth, joined in the voluntary conveyance by fine, and when afterwards, upon the deaths of all the other parties, the said Elizabeth Harris made the lease in question, the statute, by avoiding the former limitations as far as they were adverse to the durability of this interest, placed Elizabeth Harris, with respect only to the lease so made by her, in the same situation in which she would have been had no use been declared upon the fine which was levied, namely, that of tenant in fee simple, for such she would have become by force of the resulting use of that fine.

209 ‖By the operation, therefore, of the statute 27 Eliz. c. 4., the purchaser of the lease, in the case of *Goodright* v. *Moses*, derived his interest under the fine by the substitution of an use within the capacity of the lessor to create: so that in this case there was no necessity for the avoidance by this statute to reach the assurance itself. But if we suppose, for the sake of illustration, a case wherein the issue in tail, during the life of the ancestor, levies a fine to voluntary uses, and afterwards grants a lease for 21 years, to commence from a day to come, at rack rent, (so as to make the lessee a purchaser for value,) and then the ancestor dies before the commencement of the lease; there is, as it seems, no way in which the statute can help such purchaser, but by avoiding the fine itself; for if we were to suppose only the *declaration of uses* in such a case avoided, as far as they interfered with the lease, nothing but the estoppel of the fine would be left; from which a *strange* interest could draw no *direct* support, and which would be inconsistent with the

210 supposition of ‖any resulting use in the conusor, out of which the lease could be construed to be derived. We observe, however, that, in the case which has been supposed, if the force of the fine were wholly removed by the statute, the issue in tail who made the lease, would, upon the death of the ancestor, become, as to the lease, tenant in tail in possession; but yet, the lease, not being within the enabling statute 32 H. 8. c. 28. would be indefeasible *only* during the life of the lessor. This, it seems, would be the effect of construing the fine *wholly* vacated as to the lease. But this would not be a construction agreeable to the spirit and intention of the stat. 27 Eliz. which makes *only so*

much of the voluntary conveyance or assurance void in any case, as is necessary to be removed out of the way, in order to give room and perfection to the subsequent estate or interest which is to be preserved and effectuated.

It may, with strong appearance of reason, therefore, be inferred, that in such a case as was last supposed, the lease, by force of this statute, would open the bar ‖of the fine so as 211 to let in, quoad the lessee, the estate tail of the lessor. But if the statute could suspend the working of the fine till after the commencement of the lease, any further avoidance of its effect would be injurious, for after the commencement of the lease the fine could only work to its advantage. The effect of this transposition wrought by the temporary avoidance of the fine *(b)* would be to make it the case of a lease by tenant in tail, by whom a fine is afterwards levied; which brings it within the application of the doctrine in *Crocker* v. *Kelsey*, (5) whereby it appears, that if tenant in tail makes a lease for years not warranted by the statute 32 H. 8. and afterwards levies a fine to a stranger, or even to the reversioner, and dies leaving issue, neither the stranger nor reversioner can avoid the lease during the lives of the issues in tail, for if they could, it must be by reason of the right of entry ‖transferred by the fine, which 212 would have come to the issue if no such fine had been levied; but the law condemns all alienations of right only, whether it be a right of entry or right of action; and though the reversioner, by such fine levied to him, would be in his old reversion, yet as to the lessee, the estate tail would have continuance in law. (6) By this constructive *partial* suspension of the operation of the fine in the case above supposed, all the ***voluntary*** uses would be postponed to the interest of the purchaser of the lease, without any greater disturbance of the legal consequences of the fine than was necessary to give perfection to such ***valuable*** interest.

(b) This notion of a temporary avoidance is not a doctrine unknown to the common law. Vid. 7 Rep. 8 b. 9. a. Co. Litt. 46. a. Godb. 325.

(5) Sir W. Jones 61, 62. and see 2 Roll. Rep. 498.

(6) Vide 2 Rep. 7. Lillingston's case and see also Errington v. Errington, 2 Bulst. 42, 43. per Coke, C. J.

SECTION III.

‖ In returning to the subject of voluntary settlements after marriage, our attention is attracted by a modern case; (1) in which there were no circumstances but the bare fact of the settlement's being made *after* marriage, and which, though appearing to rest on the respectable motive of making provision for a family, was adjudged to be clearly within the statute 27 Eliz. by the same judges, who afterwards determined the case of *Doe* v. *Routledge*. R. E. and M. his wife, after their marriage in 1766, conveyed the premises in question to trustees, in trust for the said R. E. during life, remainder to his wife for life, remainder to the issue of the said R. E. and M. in tail, remainder, in default of issue, to the right heirs of the said R. E. and afterwards in 1769 the said R. and M., by in- 214 dentures of lease and release, made a mortgage in fee of ‖the premises in question to D. S. for securing the payment of £750, the mortgagee having full notice from a third person that the premises had been settled as before mentioned. The court had no difficulty, notwithstanding what was urged by the counsel for the defendant as to this circumstance of notice, in deciding for the lessor of the plaintiff, who was the heir of the mortgagee *

In a later case, (2) to the same effect, determined in the court of Chancery, where a settlement was made by C. E. after marriage, in which the lands were conveyed to a trustee to family uses, but reserving a power to sell, and containing a clause, whereby it was covenanted that the purchase money should be paid to the trustee in order to be by him laid out in land to be settled to the same uses. C. E. afterwards sold the land, and the purchaser having notice of the covenant, paid the money to C. E. who soon after died insolvent, leaving a widow and several children; by whom a bill ‖was brought against the 215

(1) Chapman ex dem. Staverton v. Emery, Cowp. 278.
2 Bro. Ch. Rep, 148. Evelyn v. Templar.

* Dolin v. Coltman, 1 Vern. 294; Stevens v. Olive, 2 Wils. R. 256; 2 Bro. Ch. C. 90, 93; Pulverstoft v. Pulverstoft, 18 Ves. jr. 84, 91, 92; Chapman v. Emery, Cow. 278; Cathcart v. Robinson, 5 Pet. 264; Hudnall v. Wilder, 4 M'Cord's R. 294; Greiger v. Welsh, 1 Rawle, 349; Magniac v. Thompson, 1 Bawld. C. C. R. 353.

representatives of the deceased purchaser to have the purchase money repaid to the trustees to be laid out to the uses of the settlement. And though it was contended, that, as the covenant appeared upon the face of the abstract, and consequently the purchaser had full notice thereof, the money should be considered as clothed with the same uses with which the land was clothed as against a purchaser with such notice, yet it was said by the court, that, although it would have been as well if, at first, the voluntary settlement had not been thought so little of, yet that the rule was such, and so many estates stood upon it, that it could not be shaken; and it was adjudged accordingly.*

And where a lease after marriage was assigned to a trustee in trust for the husband for life, remainder to his wife for life, remainder to the issue of the marriage; the premises being also subject to a mortgage, and afterwards A. B. contracted for and absolutely purchased the premises for a valuable consideration, ||and without notice of the settlement or mortgage, it 216 was decreed, that the trustees should convey the legal estate to the purchaser, to whom the settlement was ordered to be given up, and that the husband should pay off the mortgage money (3.)

Again in the late case of *Pringle* v. *Hodgson* (4,) where a husband made a settlement after marriage of stock standing in his wife's name, which was transferred to trustees for the purpose, the settlement was considered as fraudulent and void against creditors.**

Thus a pretty uniform series of resolutions (5) have fixed the law as to settlements made after marriage, where they have been dictated only by a spontaneous movement of affection or

(3) 1 Atk. 624. sed. vid. Reg. Lib. 1736. fol. 188.

(4) 3 Ves. Jun. 617.

(5) Vid. Ambl. 288. 1 Ch. Ca. 225. 1 Vern. 294. 2 Vern. 272.

* Wood's 804. 3 Co. 83. 12 J. R. 536. 5 B. & P. 332. 9 East, 59—70.

** It seems to be clearly agreed, that if a person makes a settlement on his wife, or child, after marriage, in consideration of love and affection and not in pursuance of any articles or agreement in consideration of the marriage, or marriage portion, that such settlement being voluntary is fraudulent against purchasers within the 27 Eliz. c. 4. Cro. Jac. 158, 455; 6 Co. 73; Hard. 395.

But if made in pursuance of marriage articles to make provision for the wife and the issue of the marriage, it is not fraudulent. Lev. 159.

prudence. Nor have the courts yet considered the circumstances of the family at the time, or the degree of moral exigency in the call for these provisions as furnishing a consideration sufficient to take a case out of the statute 27 Eliz. Yet, it
217 cannot be said, that a settlement by a husband upon a ‖wife and children destitute of any certain provision, does not, according to the rule of common benevolence by which human actions ought reciprocally to be judged, raise a presumption in favor of his motives. But the ambiguity of such a case has, notwithstanding this, always been considered as bringing it within the purview of this statute, the general policy of which requires that its operation should not be affected by such plausible distinctions as might serve perhaps only to exercise the dexterity, and multiply the disguises of fraud. *Common* presumption has, therefore, been made to give way to the *legal* presumption arising upon this statute; and the integrity of contracts and safety of property, for which this law provides, is considered as depending upon a more rigorous test of honesty than is required by the rules of ordinary caution, or consistent with the claims of common urbanity.

SECTION IV.

218 ‖ But though the courts have so far appeared to acquiesce in this political construction of the statute, yet they have always shewn an alacrity in admitting circumstances to bring these settlements after marriage within the support of valuable consideration. Thus, wherever it has appeared in proof that settlements *after* marriage have been grounded on covenants or agreements entered into *before* marriage, they have been regarded as wholly out of the statute, and sustainable against the claims of creditors or subsequent purchasers. (1) * Accordingly, in a

(1) Vid. Eq. Ca. Abr. 354. and vid. 3 Keb. 6. White v. Drake.

* Vide Supra 215 note.

case (2) where, upon a treaty of marriage between F. D. and the daughter of W. S. it had been agreed by articles reciting that a portion should be paid, (which was proved to have been afterwards paid,) that F. D., who was possessed of a legal estate in the lands in question for a term of ninety years, and entitled to the trust of the inheritance ‖of the same 219 lands, should convey them to himself and his wife, and the heirs of their two bodies by way of jointure for his wife, and provision for the family, and the marriage had taken effect; and afterwards F. D. by indenture, reciting the said articles, had assigned his term of ninety years to W. S. and another in trust for himself for life, remainder to his wife for life, and afterwards to the heirs male of their two bodies; and by the same deed limited the trust of the inheritance in the same manner; and then had granted a rent, out of the same lands, of £400 per annum, for valuable consideration, with power to the grantee to enter and hold till satisfaction, and afterwards the said F. D. and his wife being dead, and the rent being in arrear the grantee had entered, and then the trustees had assigned the term of ninety years to Sir W. D. the heir male of the said F. D. and his wife and lessor of the plaintiff; it was without difficulty adjudged, that the settlement, being in pursuance of articles made before the marriage, had not the least color of fraud to enable ‖a purchaser to avoid it; and that an agree- 220 ment for such a settlement would have been sufficient.

The efficacy ascribed, in the case above cited, to a mere verbal engagement before marriage, in furnishing a consideration sufficient to support subsequent settlements, has flowed from a strong predilection to these family provisions, by which the courts appear to have been uniformly actuated. The first case occurring in the books in which the doctrine is recognized is that of Dame *Griffin* v. *Stanhope*, (3) which, as far at it respects the point under consideration, is as follows: Upon a treaty of marriage between R. G. and S. the said R. G. promised to assure £1000 per annum to his intended wife for her jointure, his estate being worth £12,000 per annum; and she reposing

(2) 1 Vent. 193. Sir Ralph Bovy's case; et vid. 2 Keb. 700. Loyd v. Fox.

(3) Cro. Jac. 454.

confidence in such promise married him without any assurance or covenant in writing whatsoever. But the said R. G. afterwards, by deed conveyed lands of great value to some friends of his wife to the use of her the said S. for the term of one
221 ‖hundred years, if she should live so long, to commence after his death; and by an indorsement on the deed its intent was expressed to be, that when there would be a jointure of £1000 per annum settled upon the said S. according to the agreement before marriage, then the lease should be void; and it was held by the court that this lease being made in pursuance of the said promise, was grounded upon a good consideration and not fraudulent.

And in the case of *Lavender* v. *Blackstone*, above cited, it was admitted, that if the settlement, which was made after marriage, had been *conformable* to the promise in that case proved to have been made before marriage, it would have stood upon a sufficient consideration to be maintainable even against a purchaser.

This doctrine has been further confirmed by a case determined in a court of chancery; (4) from which case, however, it appears doubtful, where a settlement, made *after* mar-
222 riage in pursuance of such verbal ‖agreement made *before* marriage, rests wholly on articles, how far equity will assist the issue, on their application for specific relief, against adverse claimants. But the point seems to turn upon the distinction between the claims of general creditors, and those of purchasers and incumbrancers, which last are always objects of too strong a predilection, for any consideration to prevail with a court of equity to deprive them of their advantage at law.

H. H. in the year 1688, executed a deed, whereby the family estate was conveyed to trustees, and their heirs, on trust, to raise several sums, with a *proviso*, that as soon as J. H. his son, should marry, the trustees should convey the legal estate to John and his heirs. In 1693, J. H. married the daughter of Sir R. M. and, in 1694, made a settlement of his estate, whereby, reciting that he had intermarried as aforesaid; and that Sir R. M. and D. M. his wife's grandmother, in consideration of the said

(4) 2 Ves. 304. Ramsden v. Hylton.

marriage, and the covenants, grants, and agreements above-mentioned, had paid, or agreed and secured to pay, to J. H. £2000 for the ||marriage portion, of his said wife; he cov- 223
enanted to convey his estate, by fines or recoveries, to certain uses; and further covenanted that, till the fines were levied, he and his heirs would stand seised to those uses. The uses were to himself for life, remainder, as to part, to his wife, towards her jointure; remainder to the first and other sons of the marriage in tail male; remainder to trustees for ninety-nine years, in default of issue male, on trust, that if there should be no issue male, and two or more daughters of the marriage, to raise £8000 for their portions, to be paid to them at twenty-one years of age or marriage. J. H. died in 1707, leaving by this marriage, six children, two sons, Richard and John, and four daughters. His widow died in 1709. Richard and John successively came into the possession of this estate and died, living the sisters, without issue male. And three bills were brought; the first by creditors; the second by Sir R. U. devisee of the real estate of John, subject to his debts and incumbrances, to have the will established and the trusts ||thereof per- 224
formed; and part of the relief prayed in these two bills was to have the said settlement set aside. The third bill was brought by the husband of one of the sisters and his wife, to have the benefit of the settlement, as far as it related to the trust term of ninety-nine years for raising £8000 for daughters in default of issue male; a fourth part of which sum was claimed by her, in the event, which had happened, of the failure of issue male of her father and brothers.

Among the objections made to the performance of these articles, it was insisted, that as they were made after marriage, they must be considered as voluntary. And that, though it was true in general, that a settlement made after marriage, if a portion was paid, or secured to be paid at the time of such settlement, though no articles or agreement were entered into before marriage, was equal to a settlement before marrige; yet, in this case, it could not be inferred from the recital, that the portion agreed to be paid at the time of the marriage, related to any proposed ||settlement to be executed afterwards; so that 225
the husband was to have the portion whether the settlement

was made or not, and therefore such settlement moved voluntarily from him. But the chancellor, after taking notice that there was no pretence or color for a bill to be relieved against this settlement, which there was no fraud or imposition to impeach; and that the true question arose upon the third bill, containing the prayer for a specific execution, observed, that there were many instances, where articles after marriage had been decreed to be performed in that court, after a length of time had elapsed; and that, though it was rightly admitted, that the payment of a portion made a settlement after marriage equal to one executed before; it was wrongly objected, that, in this case, the words of the settlement did not so refer to the agreement, in consideration of the portion, as to warrant the inference of its being in pursuance of such agreement; for the portion was paid in consideration of the covenants, grants, and agreements after mentioned.

With respect to an objection which had been drawn
226 ||from the settlement's being executory and resting in cov-
enant, the chancellor remarked, that this was not altogether the case, for that the covenant to stand seised amounted *(a)* to a settlement of the equitable estate, which was all the settler had in him at the time. But supposing it had rested wholly in articles, instances had been frequent, wherein such articles on marriage were never meant to be carried into execution by an actual settlement; yet, as against the parties and the family, performance of such articles had been compelled, though not perhaps against purchasers. Length of time, he observed, was no good objection, for it must not be computed from the date of the articles, but from the event which had happened. These
227 ladies ||had no right to their demand until failure of issue male, which had happened but lately. Supposing Richard

(a) In the case of White v. Thornborough, Prec. in Chan. 428. where there was no covenant to stand seised in the mean time, as in the case cited in the text, but the settlement rested purely in covenant, Lord Harcourt seemed to think, that, from the circumstance of the portion's being paid at the time, and the Chamberlain of London's being a party, (it being an orphan's portion,) it was more than articles, and ought to be looked upon as a settlement, though a very infirm and imperfect one. But this notion of an infirm settlement was thought unintelligible by the bar.

or John had made those conveyances or settlements, and incurred all those debts, and left issue male, the issue male would have had a right to have these articles carried into execution for their benefit, notwithstanding the behavior of Richard or John, not as against mortgagees and incumbrancers *without notice*, but as against volunteers under John or his *general creditors (b)* only. And if the issue male would unquestionably have this right, there is the same reason that the daughters should have the same benefit.

Thus, in the case last above cited, we observe, that, though it has been clearly established at law, that a ||settlement after marriage, if made in pursuance even of a parol agreement before marriage, shall not be impeached by a purchaser for valuable consideration, yet, where such a settlement after marriage rests in covenant or articles only, and application is made to a court of equity for its aid in compelling a specific execution; it will not lend its assistance to the prejudice of a purchaser or mortgagee, though it will enforce execution as against the general creditor. *(c)* The || tender regard 228 229

(*b*) The reader should be reminded, that, by general creditor, here, is meant, a creditor whose debt had existence before the voluntary settlement. He may have read in a former part of this essay, that such family settlements after marriage, without any consideration but that of provision for children, is supported in all courts against creditor by contract, posterior to the settlement.

(*c*) In White v. Thornborough, Prec. in Chan. 426. which was a case wherein a settlement, resting in covenant only, was made after marriage, in consideration of a portion, the court decreed performance in favor of a daughter of the marriage against creditors, who had even acquired the legal estate by the will of the heir at law of the settler. But the reporter takes notice that several at the bar were much dissatisfied with this decree as thinking that the court ought not to have interfered, to take from just creditors their advantage at law.

It is plain that this decree carried the relief a step beyond the case of Ramsden v. Hylton, and perhaps beyond the proper boundary line, since the creditor in White v. Thornborough was not the general creditor against whom Lord Hardwicke allowed such articles after marriage (the cases being the same in principle, whether the articles be in consideration of a portion paid after marriage, or of an agreement before marriage) to be carried into execution, but a creditor standing on the same foot with a purchaser or incumbrancer, since, to a claim which was valuable, he added the legal estate.

therefore, of this court for the interests of valuable purchasers, operates, in such a case, independently of the statute 27 Eliz. which, according to the measure of relief ascribed to it by the construction of legal courts, gives no advantage to purchasers where they claim against a precedent settlement, circumstanced as that which has just been considered.—The chancellor, however, in that case, gave a clear opinion that, viewing the articles as a *settlement*, there was no color for setting them aside in favor either of purchasers or creditors, and that there was a ground for regarding the articles in question, in this light of an actual equitable settlement, since, if the subject matter had been legal, the covenant to stand seised would have so operated at *law*. *(d)*

230 ||It seems, therefore, that if such settlement after marriage, in pursuance of an agreement before marriage,

231 ||rests upon a conveyance perfected at law, it will be valid as against subsequent creditors and purchasers, in all courts.

But the anxiety of courts of equity, for the safety of purchasers, has induced them, where such valuable post-nuptial settlements rest on articles, to refuse their assistance in compelling a specific

(d) In Trevor v. Trevor, 1 P. Wms. 622. notwithstanding a covenant to stand seised until the settlement should be made, was contained in the articles, where the settler's estate too was *legal*, the chancellor would not treat them as an actual and final settlement, since, if they had been left *so* to operate, the intention of the parties would have been contravened; but carried them *virtually* into execution, against a volunteer under the articles, by directing a settlement correspondent to the true intention of the parties. But, in the same case, the court refused to disturb the estate of a purchaser of a small part of the same premises for a valuable consideration, without notice. And, it seems, that the interference of courts of equity, in directing settlements variant from the verbal import of the articles on which they are grounded, and rectifying such as correspond in *terms* so as to carry into effect the clear intention of the parties, is never *extended* to the disturbance of any valuable purchaser, although the ground of relief, in these cases, involves an admission of valuable interest in the objects in whose favor it is exerted. And though such valuable purchaser may have bought with notice of the articles, or, of both articles and settlement where the articles have been literally executed, yet he *is* not affected by *such* notice, for he is not expected to be cognizant of the rules of equity, in like manner as of the rules of law. Ambl. 288. 517. It is true, that in White v. Thornborough, this species of relief was given against the creditor, whose claim was in equal degree with that of a purchaser for value, since he had obtained the legal estate by devise, but that decree was thought very extraordinary: et vid. the case Prec. in Chan. 425.

performance, against valuable purchasers who have obtained a legal conveyance; and, in this instance, their respect to purchasers appears to have carried them beyond the measure of constructive severity, to which courts of law have extended the operation of these statutes. But the relief afforded by courts of equity, in compelling specific performances, has always been considered as the subject of pure discretionary justice, to which they are moved only by special reasons of comparative equity, in the balance of contending claims; according to the observation of Lord Talbot, in the case of *Collet* v. *De Gols* and *Ward* (5) where his lordship remarked, that "though the rule be the same in courts of equity as at law, upon the construction ‖of statutes, yet, where an act is to be *carried into execu-* 232 *tion* in equity, there are certain rules to be observed, which will bind equally in the case of an act of parliament, as of the the common law." In all cases, therefore, where the justice of the case awaits the decision of the court, independently of these statutes of Elizabeth; the question whether the purchaser has had *notice* or not, is a cardinal point in the transaction.

Thus in the case of *Ramsden* v. *Hilton*, above considered, Lord Hardwicke observed, that if there had been issue male of John, and they had come into that court for a specific performance, such assistance must have been denied them against incumbrancers or purchasers *without notice*. And the rule seems to be, that, wherever a purchaser is before a court of equity as the general object of its patronage, and not as a person resting his claim upon this statute, he must appear to have been, at the time of his entering into the contract, with notice of the former alienation or contract. For since such a settlement, as ‖in the case last considered, being grounded on a prece- 233 dent agreement, would have prevailed at law, if, instead of articles, it had stood upon a legal conveyance, so equity, where such settlement rests only on articles, will follow the law by enforcing them against a purchaser, unless the conduct of its favorite has been clear from all suspicion. But where, though the case comes into equity for the sake of the relief, both the contending claims are legal, so that the circumstances of the

(5) Cas. Temp. Talb. 69.

dispute constitute a case immediately within the operation of the statutes; courts of equity will not, it is apprehended, on mere equitable principles, put a different construction on these statutes of Elizabeth from that which prevails in courts of law. Thus in *Evelyn* v. *Templar*, above cited, where the case turned wholly upon the statute 27 Eliz. Lord Chancellor Thurlow declared himself restrained by the cases, from allowing any effect to the circumstance of the purchaser's having notice. But in a case wherein a valuable purchaser has taken a legal conveyance of the subject of his contract, after a settlement of the same
234 by *articles* ||made since marriage, but pursuant to an agreement before, though it seems, that courts of equity will generally refuse to follow the law, in derogation of such purchaser's title, yet, where the purchaser can be fixed with notice, it will depart from its neutrality and inforce the articles notwithstanding the valuable consideration. *(e)* So on the other hand, if a purchaser, under *articles*, for valuable consideration, comes into a court of equity for specific relief against an antecedent voluntary settlement, he will return back empty handed, if it appear in proof that he bought with notice of such prior claim.(6) Though, where, in such case, he has obtained a conveyance, a court of law, notwithstanding the circumstance of
235 ||notice, must support his title, upon the uniform construction of the statute.

It may not be improper in this place to remark, that, wherever the transaction either with the first claimant or with the subsequent purchaser, is not executed by a legal conveyance, but one or other of them rests in contract or covenant, the case must necessarily come into a court of equity; since a court of law,

(e) In the case of Ferrars v. Sherry, 2 Vern. 384. the settlement probably rested in articles only, and then the question of notice to the purchaser might properly come before the court. But that case extends constructive notice very far. Its authority is denied by Lord Hardwicke, Ambl. 289. The said cases of Ferrars v. Sherry, and Biscoe v. the Earl of Banbury, have carried to extremity the doctrine of implied notice. The sensible mean is concisely stated in Moor v. Bennet, 2 Chan. Ca. 246.

(6) Vid. Biscoe v. the Earl of Banbury, Chan. Cas. 287. et vid. Oxley v. Lee, vid. Reg. lib. 1736. fol. 188. where the want of notice in the valuable purchaser was the foundation of his title to relief.

while it stands in such a predicament, can give no judgment upon it under the statute 27 Eliz. Thus in the case of *Holford* v. *Holford*, (7) where the purchaser claimed by *articles*, and the court of chancery directed an issue to try the fact of fraud; application was made to the court on the part of the plaintiff, to direct that an actual conveyance should be admitted, in order that the question, upon the statute of Elizabeth, might come into issue; otherwise, though the question of fraud might be examinable generally, yet the particular constructive fraud upon the statute could not be made a point for the jury. But the application was unsuccessful.

SECTION V.

‖ It appears, however, that the indulgent inclination of 236 the courts of equity towards these cases of settlements after marriage, induces them to look very narrowly into the transaction, in order to find a ground for sustaining them against creditors. Perhaps a mere *recital* in a family settlement of an agreement before marriage, unsupported by collateral circumstances, has not yet been suffered to outweigh the objections upon the statute, yet, it seems, that very slight concomitant facts have given to these recitals the effects of proofs. Thus, in an anonymous case, (1) where a second marriage settlement was recited to be made in consideration that the wife had parted with her interest under a former settlement, which appeared to have been made after the marriage, but which was recited to have been made in consideration of a portion secured; ‖ the court, without 237 *proof* of any previous agreement for the prior settlement, presumed such agreement, and upon the strength of such presumption decreed the second settlement not voluntary against creditors. The scanty report of that case leaves us ignorant of any circumstances which may have given credibility to the recital,

(7) Chan. Cas. 216.

(1) 1 Prec. in Chan. 101.

but it is easy to imagine facts to have been made out to fill up the outline with the features and colorings of strong probability.

In the case of *Ramsden* v. *Hylton*, above noticed, the court declared itself satisfied that the portion was paid, which was recited to be the object of an agreement on the marriage, in pursuance of which, the settlement after marriage, containing such recital, was made. The chancellor, putting together all the circumstances of that case, was persuaded of the verity of the recital but he expressed his opinion to be, that proof only of the *agreement* for the portion, as the consideration of the consequent
238 settlement, was sufficient to make the ||issues of the marriage valuable purchasers; and he declared his wonder that so much proof had been produced at such a distance of time. From which intimations there is ground for supposing that some circumstances not appearing in the report added weight to the recital in the settlement, and that in such cases some testimony from corroborative facts is expected to be produced, though with great allowance for dispersion by length of time.

In a subsequent case (2) Harriet D. being entitled under the will of P. D. her father, to £1000 in the 3 per cents, and to some other stock, and also to a share of the residuary estate, married J. C. After the marriage a settlement by indenture was made, reciting a parol agreement before marriage to settle her property; and settling it in pursuance of that agreement upon trustees in trust out of the annual proceeds to pay £100 per annum to the wife for her separate use, and to pay the remainder of the produce to the husband for life, then to
239 the wife for life, then among the children ||of the marriage, as the survivor should appoint. Harriet C. the wife, being dead, a bill was filed by the creditors of J. C. praying that the settlement might be declared fraudulent and void against creditors, and be set aside, and for an account of the effects of the testator P. D. and that the residue, after payment of his debts, legacies, and funeral expences, might be ascertained; and that the share thereof to which Harriet C. was entitled, and so much stock as belonged to her under the will, and was yet unsold, might be applied to the payment and satisfaction of the creditors

(2) 1 Ves. Jun. 196. Dundas v. Dutens.

of J. C. The chancellor was of opinion in favor of the settlement, notwithstanding it was urged at the bar, and admitted by the court, that a *parol* agreement or settlement previous to marriage is absolutely void; and that a subsequent marriage is not a part-execution of such an agreement to take it out of the statute of frauds and purjuries, and enable the court to proceed in compelling a complete performance. We may observe in this case, that, though the court seemed ||to carry very far its 240 complaisance to these recitals, the validity of the settlement in question was not thought necessary to ground the denial of relief, for the chancellor was strongly of opinon that creditors could not obtain satisfaction of their debts out of *stock* by the assistance of that court any more than by execution at law. It may be remarked also that in the above case the wife's property (3) was the subject of the settlement, which may be looked upon as a circumstance corroborative of the recital, by heightening the probability of a pre-existent agreement; or may be regarded as furnishing of itself a consideration for the settlement sufficient to support it without resort to the supposition of any agreement before marriage. For it appears to be very consonant with reason and usage that the wife's fortune should not be given up to the husband without some previous stipulation for provisions for herself and future family, and therefore a recital to this effect in a settlement after marriage of the wife's property finds credit with a court of equity, which will ||be- 241 friend no subsequent claims in derogation thereof; and in the case of *Brown* v. *Jones*, (4) where the portion which was given to the husband by the wife's brother was paid three months before the settlement was executed, but in the receipt given to the brother, the intention of making the settlement was expressed, though it was objected that this was only recital, the court held that there was a good consideration to support the settlement when afterwards made. And it was observed by Lord Hardwicke, that a consideration executed was as good to support a settlement as it was to support an *assumpsit* at law. *(a)* But we

(3) Vid. 2 Atk. 602. (4) 1 Atk. 188.

(a) There may be, perhaps, some danger in reasoning analogically from the principles on which considerations either to raise *assumpsit* or uses at common

must remember, that if such settlement after marriage rest only in covenant and articles, equity will decree performance
242 only ‖against the party himself, his representatives, those claiming under him with notice, or without consideration, and the general creditors, and not against *bona fide* purchasers and incumbrancers. (5) From the report of *Dundass* v. *Dutens*,* the facts of the case can only be obscurely collected; but it should seem that, if the settlement was made while the bequests of the will in favor of the wife remained subject to the legal right of the executors, this settlement of her interest was no more than the court of chancery would have insisted upon, if a bill had been brought by the husband to compel payment by the executors, according to the doctrine in *Jewson* v. *Moulson*, (6) as propounded by Lord Hardwicke; and in this view the case seems to fall within the principle of *Moor* v. *Rycault*, (7) where a husband, who had made no provision for his wife, agreed that her fortune, which was in the hands of trustees, should be laid out in the purchase of lands; this agreement, though *after* marriage, the court would not consider as voluntary, so as to postpone it to the claim of the husband's creditor.

243 ‖We observe, that, in the above mentioned case of *Dundass* v. *Dutens* the statute of frauds was urged at the bar, as an answer to the importance ascribed to the recital, which the settlement contained, of a pre-existent parol agreement for the subsequent settlement; but that the court did not allow that argument to alter its opinion, which was in favor of the validity of the settlement.—Indeed the cases seem clearly to have settled that proof of a parol (8) agreement before marriage will support the subsequent settlement by which it is followed up, against the claims of creditors or purchasers. But as it cannot be denied

law are grounded, to the nature of the consideration required by these statutes of Elizabeth. They stand on a different foot as to their final object, which, in the one case, is to manifest the *verity*, in the other, the *purity* of intention in the donor or contractor.

(5) Vid. 2 Ves. 309. and Trevor v. Trevor, 1 P. Wms. 622.
(6) 2 Atk. 417, and the cases there cited. (7) Prec. in Chan. 22.
(8) Vid. Str. 237

* Denied in Reade v. Livingston, 3 J. Ch. R. 490. See also 5 Cow. 72, 73.

that such parol agreements are within the statute of frauds, 29 Car. 2. the inference is, that the consideration for the these settlements after marriage, drawn from the existence of prior agreements, does not depend upon any legal obligation to the performance of them. The above mentioned statute of Car. 2. has sunk the legal remedies upon such parol agreements; yet, though no proof can be admitted to give to them a substantive ‖validity, there are many instances both at law and in equity of 244 their influence on the construction and efficacy of written agreements; (9) and in this subsidiary light they have always imparted strength to settlements after marriage, were the thing agreed to be done, and the thing performed, exhibit so plain a correspondence as to unite them in a derivation from the same original motive. Upon a similar principle it was agreed in the case of *Lavender* v. *Blackstone* above cited, that a promise made by an *infant* on his marriage to settle his estate when of age, was a sufficient consideration to support the settlement after marriage made in pursuance of such promise, although by law the infant was not compellable to fulfil the same. *(b)*

SECTION VI.

‖It seems, however, that a settlement *after* marriage, can 245 derive no validity from such agreement *before* marriage (whether such agreement be by writing or parol) unless there be such a conformity (1) between the thing done, and the thing promised, as imports a veritable intention of performance. It is, in deed, sometimes the practice to insert in marriage articles, a clause,

(9) 2 Ves. 375. Pitcairne v. Ogbourne.
(1) 1 Ambl. 288.

(*b*) And it seems, that where a feme infant, seised in fee, covenants with the consent of her guardians, in consideration of a settlement, to convey her inheritance to her intended husband, if this be done in consideration of a competent provision, equity will execute the agreement, though no action would lie at law to recover damages. 2 P. Wms. 243, Cannel v. Buckle, and see the cases cited in Mr. Coxe's case.

authorising a deviation therefrom in the future settlement; yet such control being committed to those whose interest arises from the articles, the exercise of it is still founded upon the articles, notwithstanding the variation it introduces, and participates in the marriage consideration. In such a case also, it may be observed that the articles, in placing the parties in a situation to contract with each other, by making their mutual consent necessary, potentially provide for the renewal of a consideration to
246 give value and validity to fresh arrangements. ‖But when without any such provision the settlement *substantially* varies from the agreement made on the treaty of marriage, it is plain that it cannot be incorporated with it so as to draw any virtue from the marriage consideration. Thus in case of *Lavender* v. *Blackstone* so frequently cited, the promise by the intended husband made upon the marriage treaty being to settle his estate upon himself and issue, and the settlement being only of the residue of the money to arise from the sale of the estate, which was vested in trustees for raising a sufficient sum to satisfy subsisting and future debts; this was considered as so substantial a variation as wholly to disconnect the promise and the settlement, and to leave the latter entirely without support from the consideration of the former.

In the case, before cited, of *Griffin* v. *Stanhope* (2), though the lease was not specifically in the contemplation of
247 the marrying persons at the time when the ‖promise was made, yet, as the general intention of the parties to the contract was effectuated by the lease, it was considered as grounded on a sufficient consideration. And a liberal regard to the general spirit and meaning of the agreement before marriage seems to have prevailed as to this point in the courts both of equity and law. Thus, though it seems to have been considered in the case of *Jason* v. *Jervis*, (3) that if a bond before marriage be only for a *jointure*, and the settlement goes further, and entails the land upon the children of the marriage, the settlement may be good as to the jointure, and fraudulent as to the remainder in respect to a purchaser: there being no room for any latitude of construction where the stipulation so expressly

(2) Cro. Jac. 454. (3) 1 Vern. 265.

bounds itself to the interest of the wife. Yet where (4) the intended husband was under age, and so incapable of making a settlement, and the wife's father gave a bond for the payment of £1,500 on his making a *suitable jointure settlement*; here, though the husband some years after, on payment of the £1,500 made a ‖settlement of £147 *per annum* on himself for life, remainder to his wife for life for her jointure, with remainder to their first and other sons in the usual form; it was holden that this settlement was good and valid as against purchasers, being only adequate to the wife's fortune, and that a *jointure settlement must be intended a settlement, in the common form, to the issue, with a jointure to the wife.* 248

SECTION VII.

But settlements made after marriage are often sustainable against *bona fide* purchasers for valuable consideration, where they do not rest upon any articles, promises, or agreements entered into *before* marriage. If the situation of the parties be such in point of reciprocity as to give to the proceeding the semblance of a contract, that sort of valuable consideration is produced, the principle and reason of which have before been discussed in considering the case of such limitees in marriage settlements as are not embraced by the original consideration of marriage. In cases where the settlement is before marriage, the supervenient interest of a parent or other relation is accessorial to the marriage consideration, and opens a free channel of expectant interests to which it extends the protection of a valuable consideration. But where the parent after the marriage of his son lends his necessary concurrence to the ‖settlement of an estate, in which the father and son have several interests, their mutual concession and accommodation may be of itself the source from which all the limitations of such settlement deduce a valuable support against a subsequent purchaser. This doctrine was clearly recognized and relied on by Lord Hardwicke in the 250

(4) Prec. in Cham. 520.

case before mentioned of *Russel et al.* v. *Hammond*, (1) wherein the Chancellor observes, that he was spared the necessity of entering into any nice inquiry into the question, whether a voluntary settlement be fraudulent or not, because, as to the Ford estate, there was a valuable consideration on the face of the settlement, for the father was tenant for life, and the son entitled to the remainder in tail. And where a father and his son join in a family settlement, it is a bargain for a good and valuable consideration, and has been so held in several cases. In the case then under discussion his Lordship observed, that the son could not have settled the residuary interest without the father's help, because he was tenant in tail in remainder, and
251 not in possession.* But if the ||father had been tenant for life, and the son tenant in fee, and they had joined in such settlement, it would have made a material difference, for then, his Lordship said, he should have thought the settlement bad, for, under such circumstances there could have been no occasion for the father's joining, as the son might have disposed of the residuary interest without him.

SECTION VIII.

252 || A portion given to the husband by the friends of the wife is a valuable consideration for the limitations of a settlement after marriage in favor of the wife and the issue. (1) Thus in *Colville* v. *Parker* before cited, (2), where a husband voluntarily assigned a lease for years by way of jointure for his

(1) 1 Atk. 16. Lord Hardwicke is made by the Reporter to speak of the Ford estate which appears to have been leasehold. But his observation applies rather to freehold property. And this application of it to the Ford estate does not occur in the Register's book.

(1) 2 Ves. 18 Ambl. 121, per Ld. Hardw. (2) Cro. Jac. 158.

*Jackson v. Ham, 15 J. R. 263; Roberts v. Andrews, 3 J. Ch. R. 397; 3 Desaus. Ch. R. 304; Taylor v. Harriot, 4 Desaus. Ch. R. 232; Sterry v. Arden, 1 J. Ch. R. 267; King v. Colton, 2 P. W. 674.

wife, and took the profits, and afterwards sold it to another, it was held to be within the statute, because it was a voluntary conveyance, and should be intended fraudulent from the beginning. But it was agreed, that if at the time of the marriage or *afterwards*, by reason of a portion given by his wife's friends in recompence thereof, and for a provision in favor of his wife, he had made an assignment of such lease to his wife's friends, and had afterwards taken the profits thereof, and then had sold the term, such a transaction would not have been within the statute.

‖And (3) where the husband, in consideration of an additional portion of £100 paid by the wife's mother, set- 253 tled an estate of £100, *per annum*, upon himself for life, remainder to his first and other sons, &c. and thirteen years after mortgaged his estate with the usual covenants; and upon his death, the mortgagee brought his bill against the son to foreclose. Lord Talbot said it would be very hard to call this a fraudulent settlement; since it was in consideration of a marriage had, and of an *additional provision of £100 paid by the wife's relations*, which cannot be said to be voluntary against a mortgagee, who lent his money thirteen years afterwards.

Again in the case of *Russel* v. *Hammond*, before cited, a portion paid after marriage was called by Lord Chancellor Hardwicke a good pecuniary consideration. (*a*.)

(3) Ca. Temp. Talbot, 64.

(*a*) In White v. Thornborough, Prec. in Chan. 425. Gilb. Eq. 107, where the husband, in consideration of a portion paid after marriage, articled to settle his estates to the use of himself for life, remainder to the use of Mary his wife for life, remainder to the heirs of his body on the body of the said Mary begotten, with remainder to his own right heirs, the court of Chancery paid such regard to the portion as to support the claims of the female issue of the marriage against the creditors of the son, which creditors had obtained the *legal* estate under a devise by the son upon whom it had *descended* before his death; and this, though the daughter, to whom no interest was given by the literal import of the articles, could only claim on the ground, that if a bill had been brought to have them carried into execution the settlement would have been directed to have been made, with a remainder to the daughters and the heirs of their bodies, or with a remainder to the heirs of the body of the father. It should be observed, that the nature of the portion paid in this case of White v. Thornborough, (it being her orphanage part by the custom of the city of London,) distinguishes it from the cases in the text. It has hitherto been cited only for the illustration of collateral points; but it will be more appropriately arranged, in a future part of the

‖*Brown* v. *Jones* (4) is also a case of similar import, which was shortly thus: A. being seised of an estate in fee, married B. but, receiving no more than £150 with his wife, 255 made no settlement upon her at the time ‖of the marriage.

But afterwards in a treaty with C. his wife's brother, the brother agreed to give his sister £1000; £600 of which was paid on the 24th of June 1732; and a receipt was taken from A. the husband, declaring himself to have received of his brother the said £600 in consideration of the settlement to be made on his wife. The settlement was executed on the 8th of August following; which settlement was recited to be in consideration of a marriage already had, and the sum of £1000 paid as a marriage portion by C. to A. and for settling a jointure; and the estate of A. was thereby conveyed to trustees to the use of the husband for life; remainder to the trustees to preserve contingent remainders, remainder to the wife for life, for her jointure, and after the deaths of husband and wife to the use of the trustees for the term of ninety-nine years, upon such trusts as should be thereinafter expressed, and after the determination of that estate to the first and other sons of the marriage in tail male.

There was no declaration of the trusts of the term of ninety-256 nine ‖years, nor any receipt indorsed on the back of the settlement: and the husband becoming bankrupt, the bill was brought by the assignees to have this settled estate sold. And among other things it was contended, that the trust of the term for want of a declaration, reverted to the husband for the benefit of his creditors.

The Chancellor made two questions, first, whether the deed was valid against creditors; secondly, whether, if valid, the creditors could claim any benefit under the settlement, as being entitled to have the trust of the term construed as resulting to the husband for their benefit. His Lordship was clearly of opinion as to the first question, that the settlement could not be impeached, being grounded on a valuable consideration. And on

body of the work, among the cases where the settlement after marriage derives its value, not from an original donation of the wife's friends, but from the peculiar predicament of the wife's property. Yet it enforces the doctrine under present consideration by reasons *a fortiori*.

(4) 1 Atk. 188.

the second point his Lordship held that it was involved in the determination of the first; for if the deed had been *voluntary*, the construction demanded by the creditors ought to have been made, but as it was *valuable* it must be regarded as a contract for ‖the wife's jointure, and also for the benefit of the 257 issue. If the husband had been the plaintiff in the cause, the court would have considered the term as a trust-term only to attend the inheritance according to the limitations in the settlement *(b)*; and the assignee could be in no better condition than the bankrupt.

And in the case of *Stileman* v. *Ashdown* (5,) a settlement after marriage, containing a recital of a portion paid, and being long anterior to the claim set up by the judgment creditor in that case, was not suffered to be impeached by such claimant; for the Chancellor observed that, though the settlement was made after marriage, yet being in consideration of a portion *which*, ‖*for anything that appeared, was paid at the time*, 258 it was not liable to be overturned by subsequent creditors. Nor can it be objected to the claims of the issue, under such a settlement after marriage, that the portion agreed to be paid was in fact unpaid; for, if a husband settles his estate upon his issue, in consideration of a portion to be paid by the friends of his wife, it is not the recompence but the inducement which imparts value to such family provision, since the fraudulent intent within the statutes is as much disproved by a moral certainty of the expectation, as by the actual receipt of an equivalent.

Thus (6,) according to the report of *Ramsden* v. *Hylton*, or *Hylton* v. *Biscoe*, Lord Hardwicke seems to treat the question whether the portion agreed to be paid was actually paid, as immaterial to the title of the issue; though it is not very easy to comprehend the force of the reason with which that position is there supported, viz. "that the issue of the marriage take from both ‖parties, so that whether they perform their agree- 259 ment among themselves may be immaterial to the issue."

(*b*) Vid. the case of Uvedale v. Halfpenny, 2 P. Wms. 151. where the trustees to preserve contingent remainders, having been placed in a settlement after a limitation of an estate tail to the first and other sons, the settlement was decreed to be rectified without any evidence of intention in the parties as to the placing of the limitation; and see 1 P. Wms. 234. 5 Ves. 194. 333. 1 Atk. 419.

(5) 2 Atk. 477. (6) 1 Ves. 309.

In looking into such cases for the features of a contract, to carry to the limitees under the settlement the support of a valuable consideration, we must find somebody to invest with the character of a purchaser, from whom the consideration may move; and somebody in whom the interest resides, and from whom the limitations or provisions may be purchased by the consideration. Thus, where a husband, in consideration of a portion from the friends of his wife, settles all, or a part of his own estate, so as to make provision thereout for his wife and issue, the wife and her friends are properly the purchasers, or, to speak with more latitude, the issue are purchasers under the maternal ancestors, from their father, and not, as it should seem, (with reverence to the great authority above-mentioned,) under *both* parents, who cannot devolve upon the issue the character of purchaser from both, unless they have both an interest in the same property, 260 so as to be enabled ‖to deal reciprocally with each other, in measuring out the dispositions of it among their posterity.

It seems hardly reconcileable with reason to talk of purchasers, in that sense of the word with which we are concerned at present, without adverting to a transaction which will bear out the inference of a constructive contract in favor of such *purchasers*, a name extended to those who, though not original parties to the contract, are primarily or derivatively within the prospect of the supposed stipulations. It was, therefore, asked, by way of objection at the bar, in the case of the *Earl of Coventry (c)*, (where tenant for life with power to make a jointure, remainder over, covenanted to make a jointure to a wife, in consideration of marriage, by virtue of his power, and died before making the jointure, ‖and the court was applied to for a compulsory 261 execution of the covenant, in favor of the widow, by the remainder-man,) from whom could the wife be a purchaser? to which it was replied; from the owner of the inheritance who gave the power.

(c) According to Fitz-Gibbon, 211. where the case is cited. The case is reported in 9 Mod. 12. 1 Str. 596. 2 P. Wms. 212. and very fully at the end of Maxims in Equity.

SECTION IX.

‖But it is not always necessary that *third* persons should 262
intervene to qualify these settlements after marriage, to stand, as against purchasers for valuable consideration. A wife, having a present provision by settlement before marriage, is in a capacity to become a purchaser from a husband, by the surrender of such exising interest, of a fresh and even ampler provision for herself, and more extended and beneficial limitations to the issue of the marriage.* And, where such surrender of the wife's interest is made by the reabsorption of the jointure into the mass of property out of which the new limitations are to arise, the above mentioned remark of Lord Hardwicke seems properly applicable, since, in such a case, there is ground for regarding the issue as purchasers under *both* their parents, who ‖to this purpose are joint contributors. In the case, in- 263
deed, of *Scott* v. *Bell*, (1) where the wife joined in the *total alienation* of her jointure, she only could be considered as the purchaser of the new limitations, which came out of another estate of the husband. That case was thus:

R. B. upon his marriage with M. C. settled the manors of Brandon, Brooking, and Bardolff farm, to the use of himself

(1) 2 Lev. 70.

*Although an agreement by the wife to convey, cannot be enforced, an agreement by the husband though merely parol and made directly with the wife, in consideration of her conveying her land, will be enforced even against his heirs.

A husband agreed in consideration of such conveyance, to purchase and build on other lands and convey them to the wife. He did buy and build upon the land, but died without conveying. The husband was very poor at the time of the marriage but the property agreed to be conveyed to the wife greatly exceeded in value the land the wife parted with. The agreement was enforced against the heirs. Gosden v. Tucker, 6 Mumf. R. 1.

On the other hand when it was verbally agreed, between husband and wife, that he should purchase land in her name, and build a house upon it, and that he should be reimbursed the expenses from the sale of other lands belonging to the wife, and the husband fulfilled his part of the contract, but the wife died before conveyance of her land, it was decreed in chancery, that the guardian of her infant heirs should convey with the husband, and the proceeds of the sale be applied according to the contract. Livingston v. Livingston, 2 J. C. R. 537.

for life, remainder to the wife for her jointure, remainder to their first and other sons in tail; remainder to his own right heirs, and the manor of Baupre to the use of him and his heirs. R. B. afterwards, he being then indebted to the amount of £4000 and having no issue, was joined by his wife in a fine, whereby the jointure lands were sold for payment of his debts. And the same day he covenanted to stand seised of the manor of Baupre to the same uses as the manor of Brandon, &c. were before settled. The debts were paid, and about fifteen or sixteen years after, R. B. contracted new debts, for which H.
264 became bound ||with him, and for the security of the said H, he made a lease to him for one thousand years of the said manor of Baupre. H. was forced to pay several of the debts, and by virtue of the said lease for one thousand years, demised to the plaintiff, who brought ejectment.

The question was, whether, as against the lease, the settlement after the marriage of the manor of Baupre, was fraudulent or not under the statute 27 Eliz. It was objected, first, that there were no articles or agreement precedent to the second settlement, to shew that the wife's joining in the fine for the sale of her jointure, was the consideration for making that settlement. and so the fine and sale of the jointure and the subsequent settlement having no apparent mutual connection, the latter must be considered as altogether voluntary. Secondly, it was objected, that the husband without the wife might have destroyed the contingent limitations to the sons, no son being then born, and no mesne remainder having been limited to preserve them,
265 so that the consideration could not be pretended to cover these estates to the sons, which must be therefore considered as merely voluntary.

But by Hale C. J. and the court the settlement was adjudged not void as to the lease. And it was said, that, the old settlement being destroyed, and the new one made the *same* day, *an agreement by the husband to make the new settlement*, in consideration that the wife would pass the fine and bar the old settlement, should be intended, and that the consideration should extend to all the limitations of the new settlement: for that it should not be presumed that the wife would have parted with her estate by the old settlement, unless the baron would make

the same provision for her and her issue by the new; and though, it was true, *he* might have destroyed the limitations to sons without *his wife's* concurrence, yet that *that point* was not so well known at the time when the settlement in question was made, and nobody would then have purchased under R. B. if *his wife* had not joined. And, notwithstanding the lands in the new settlement were almost double the ‖value of those in the 266 first settlement, yet the jury were directed to find for the defendant, who was the son of R. B. by M. C. his wife, the father being dead.

The case, therefore, of *Scott* v. *Bell* has decided that a jointured wife, may, by renouncing her present provision, become a purchaser, for valuable consideration, from her husband of an ampler provision for herself; and if the same act, by her concurrence in which she thus abdicates her own title, involves the destruction of the limitations designed as a provision for the issue of the marriage, such concurrence will support a fresh settlement of other property of the husband upon the issue of the marriage, to a more beneficial extent than the former settlement had been carried. And though no precedent *agreement* be shewn, to prove the mutual relation of these transactions, yet if the sacrifice and retribution have a clear respect to each other, both as to time and circumstances, their reciprocity of consideration will be presumed by the courts. In ‖the above-mentioned case of *Scott* v. *Bell*, the act of 267 retribution being immediately consecutive to the act whereby the first settlement was defeated, and being, at least to the extent of the provisions in the first settlement an act of natural justice and parental duty, the fairest reason presented itself for referring the whole to one contract. It is true, the provisions of the *second* settlement were greatly more bountiful than those of the first; but, as was said by Lord Talbot in the case of *Jones* v. *Marsh*, there is *room* for *bounty* in these family settlements. We observe, however, that, in *Scott* v. *Bell*, though the provisions of the two settlements varied in magnitude, the *same persons* were the objects of both; and undoubtedly, where the objects are the same, we more easily unite the deprivation and restitution within the terms of the same supposed bargain.

It seems, too, that where the wife concurs in defeating the

provisions of a marriage settlement for herself and the sons or daughters of the marriage, a *second* settlement may com-
268 prize limitations to children *unprovided* ‖*for* by the *first*, so as to impart to them the support of a valuable consideration, if the unsettling instrument be expressly stated to be the consideration, for these superadded limitations. The case of *Ball* v. *Burnford* (2) is an authority for this position: which case was thus: E. A. being tenant for life of lands, with remainder, as to part, to his wife, for her life, for her jointure, remainder to the heirs male of their two bodies, acknowledged a judgment to the plaintiff, and then entered into covenants with J. S. that he and his wife would join in a fine, which should be in the first place to the use of J. S. and his heirs, by way of mortgage for securing a sum of money, then to the husband for life, then to the wife for life for her jointure, then to the sons of the husband and wife in tail, *then to the daughters in tail.* And a fine was levied accordingly. There were other incumbrances upon the estate, prior to the first settlement, which J. S. the mortgagee, or the defendant Burnford (for whom he was a trustee) purchased in. E. A. died without issue male, leaving daughters of the marriage, who were also defendants.
269 ‖The plaintiff brought his bill to be left into the benefit of his judgment, paying the mortgagee what he really had paid; for that by the fine the estate tail was barred, and the judgment let in, and that this settlement as to the daughters was voluntary. It was admitted that the fine had barred the estate tail created by the first settlement, but it was insisted that the daughters were purchasers by the mother's joining to bar her jointure; and that *that* consideration did extend to the estate of her daughters as well as her own. But the Lord Keeper was of opinion, that, though this *might* have been made a good consideration for *both*; yet, as it was not expressed in the deed that the mother's concurrence in barring the jointure was to be any consideration for settling the estate upon the daughters, the estate of the daughters must be taken to be voluntary, and therefore a judgment creditor ought to have the assistance of the court before the daughters.

With respect to this case, we observe, that, if there
270 ‖had been no outstanding legal estates, so that the creditor

(2) Prec. in Chan. 113.

might have had the benefit of his judgment at law, it is evident by the fine he would have been let in upon all the interests under the new settlement; and that, as against the mortgagee himself there was no equity to oppose his application for liberty to redeem; but, as it *was necessary* to go into equity for assistance, by reason of the outstanding terms, the court would not have afforded its aid, in derogation of the limitations to the daughters under the settlement, if, by fair construction, those limitations could have been brought within the scope of the valuable consideration.

Where the husband is joined by his wife in levying a fine of the wife's inheritance, to family uses or trusts, and a separate interest is given to the wife, or any estates are created which trench upon the derivative freehold of the husband, it seems, upon a general principle of reasoning, that the provisions of a settlement ‖resting upon such inferred contract, *(a)* 271 are unimpeachable by subsequent purchasers. For the husband and wife seem both to be capable, in such a case, of being respectively considered as valuable purchasers of the several interests arising from such a transaction. The wife has substantially purchased her separate interest or estate, during the husband's life, out of his marital freehold, and the husband has given a valuable consideration to qualify him as a purchaser of the provisions for their common children out of the mother's inheritance.

But where, under the same circumstances, the limitations or provisions of the settlement, grounded on such fine, *integrally* restore the husband's former interest in the wife's property, or so nearly restore it, as ‖to reduce the consideration to a color- 272 able minuteness, so that his mere concurrence in the fine is the only meritorious act on his part, it seems *doubtful* at *least*, whether this simple transaction furnishes a valuable consideration for the settlement of the wife's property, so as to protect it against a valuable purchaser from the wife after the death of the husband.

(a) Though the wife cannot *legally* contract with her husband, so as that the contract itself can be said to stand upon a *legal* consideration, (for the husband and wife are one in law,) yet they are so far *morally* capable of contracting with each other, as that such contract may be a perfect consideration for their subsequent acts.

The case first put, wherein the husband was supposed to make a sacrifice of a portion of his marital interest; may, perhaps, be said to fall within the principle of Lord Hardwicke's doctrine in *Russel* v. *Hammond*, (3) before noticed, viz. that where a father, tenant for life, and the son remainder-man in tail, join in a settlement after the marriage of the son, it is a bargain for a good and valuable consideration; since the father's concurrence was *necessary;* but his lordship made it appear, in a subsequent part of that case, that he did not annex the idea of a valu able consideration merely to the father's *concurrence*, but that he supposed, at the same time, a relinquishment by him of all
273 or part of his precedent ‖ particular estate; for it was, afterwards, observed by his lordship, that "there was a plain badge of fraud in the settlement of another estate, which was also in dispute in that case, since the father took back an annuity to himself which was probably the full value of the estate comprised in the deed; and therfore parted with nothing to the son, so that it was almost tantamount to a continuance in possession, which was always deemed a strong circumstance of fraud." The chancellor's observation seems applicable in principle to the case of *Goodright* v. *Moses*, (4) cited and enlarged upon in a former part of this essay, where a fine was levied of an estate in remainder of Elizabeth Harris the wife, in which J. R., her father, and tenant for life, and Thomas, her husband, joined, but the uses of which fine gave back to J. R. and the husband the same quantities of interest which belonged to them before the fine was levied, so that there was nothing in that case to support the settlement on the children of Thomas and Elizabeth, but the bare concurrence of
274 ‖the parties to the assurance, and the court accordingly adjudged the settlements void against a valuable purchaser from Elizabeth after the death of J. R. and Thomas; and it may be observed, by the way, that this case of *Goodright* v. *Moses* must be regarded as one of the strongest in the books upon the statute 27th Eliz. since there the statutory presumption of fraudulent intent from the want of valuable consideration in the settlement, was allowed to be so prevailing, as to connect in continuity of purpose the voluntary act and the subsequent valuable convey-

(3) 1 Atk. 16. (4) 2 Blackstone 1019.

ance, notwithstanding the suspense of the husband's life was interposed between the design and accomplishment.

Whether any and what degree of value is derived from the concurrence of a married woman in a fine to bar herself of dower out of her husband's lands, are points as it should seem of some ambiguity. In *Lavender* v. *Blackstone* (5) before cited, it was said by the court, that "as the wife did not join in the fine which was levied by the husband of his estate tail, she continued ‖dowable; but if she *had* joined, it might have made 275
the settlement to be upon good consideration, which, otherwise, was merely voluntary."

It appears, on the perusal of that case, that if the wife had joined in the fine to bar herself of dower, the sacrifice on her part would by no means have been unsubstantial, since no *certain* provision was substituted, by the deed, in lieu of her claim of dower, and the provision, uncertain as it was, (being dependent on a mere power of jointuring,) was, moreover, postponed to the payment of the husband's debts. Although there does not appear any subsequent authority to support the above opinion thrown out in the case of *Lavender* v. *Blackstone*, yet the principle on which it stands seems to be fortified by the general reasoning of the cases upon the statute 27 Eliz. But in a subsequent case, determined in the court of Chancery (6,) where a husband having mortgaged his land, and the wife having joined in levying a fine of the same, for the purpose of barring her right of dower, the husband, in ‖consideration thereof, had 276
agreed that his wife should have the whole equity of redemption in lieu of her dower, and afterwards twice mortgaged the same land, the court declare the agreement to be fraudulent against the subsequent mortgagees; but since in confidence of this agreement she had joined in the fine, and thereby barred her dower, the decree allowed her to enjoy her dower in case she survived her husband. In the case of *Scott* v. *Bell* (7) before cited, the concurrence of the wife in the deed, by which her jointure was aliened, was held a valuable consideration for the

(5) 2 Lev. 146.

(6) Dolin v. Coltman, 1 Vern. 294.

(7) 2 Lev. 70. et vid. supra 263.

settlement; and it seems reasonable to presume, that if the wife in that case had joined in the fine for the purpose only of barring her dower, instead of parting with her jointure interest in the manor of Black-acre; and in consideration of her joining for such purpose, the husband had limited a life estate to her in his lands at White-acre, such estate would have been good and supportable against creditors or subsequent purchasers for valuable consideration. But it seems very reasonable, where
277 a ‖married woman joins in a fine for barring her dower, from which fine no personal advantage accrues to the husband, but the benefit of which redounds to the wife by means of a family settlement grounded thereupon, comprising a jointure, or a provision in the nature of a jointure, exceeding her dower in value, to hold this a voluntary settlement by the husband, since he receives, in such a case, no veritable consideration for what he bestows, the dispositions in favor of his children, if any, not depending upon his wife's concurrence, and the augmented provision for herself standing in no danger of want of confirmation by her elective preference after the husband's death. Accordingly, in a late case (8) before cited, the counsel for the plaintiff, claiming under the purchaser, insisted upon the effect of the fine, on which the voluntary settlement was grounded, and in which the husband and wife had joined, as barring the wife of her dower, without raising any surmise of valuable consideration as arising from her concurrence.

SECTION X.

278 ‖ Such seems to have been the understanding of the courts in cases wherein the husband and wife have been the only parties in this presumptive bargain, out of which the consideration is drawn for the support of the settlement. But the tutelary interference of the court of chancery, where the property of the wife is in the custody of that court, or in

(8) Evelyn v. Templar, 2 Bro. C. C. 148. et vid. supra 214.

the hands of trustees, has supplied another sort of valuable consideration, by which settlements after marriage may be supported. It has been very long (1) the practice of that court, whenever a husband is obliged to have recourse to its jurisdiction, in order to gain possession of his wife's fortune, to see that a suitable provision is made for the wife, before it stirs a step to assist the husband. *(a)* || Nor is the rule affected 279 by the diversity of predicament, in which a married woman's fortune may be ||placed; the ground of the court's inter- 280 ference exists only in the *necessity* of obtaining its assistance, without regard to the circumstances which induce the application. And it seems to be established that a settlement after marriage

(1) Vid. the case of Jewson v. Moulson, 2 Atk. 420.

(*a*) There would be no end of citing cases wherein this rule has been recognised and acted upon. References to most of them may be found in the following places: 4 Vin. 199. et seq. 1 Bac. Abr. last edit. 481. the editor's note. 1 P. Wms. 383. Mr. Coxe's note. 1 Eq. Ca. Abr. 64. 3 P. Wms. 305. And see where Lord King expressed some disapprobation of the rule, but submitted to the practice; and with a seeming inconsistency declared he would not condemn a man to pay costs for insisting upon a right which the law gives him, whereby the costs were thrown upon the executor, who withheld the wife's legacy, for a conduct which, by the chancellor's admission, the court had always approved of. In the late case of Ball v. Montgomery, 2 Ves. Jun. 191. the court seemed to touch the extreme limit of the rule, where there was a settlement, on marriage, of stock belonging to the wife, in trust, after the death of the wife, for the husband for life; if no issue the whole to revest in the wife, with a general power to her appointment; and in default thereof to her next of kin; without any disposition of the interest and dividends during the lives of husband and wife. The wife eloped, and lived in open adultery; and a bill was brought by the husband against the wife and trustees claiming the interest and dividends during their joint lives. The husband insisted that it was a mere omission in not giving him the interest and dividends during his life. The wife contended that the omission lay in not creating a trust as to those dividends for the separate use of the wife. The Lord Chancellor considering this was a fund for their *common* provision, and that, as they were *de facto* separated, that intention would be clearly defeated by giving the husband the *whole*, and thinking the case very distinguishable from that of an *express* gift of the husband, would not decree for the husband and wife, but ordered the dividends in future to be paid into court till further order, that the parties might thus be *forced* into some agreement for the wife's support.

so enforced is to be regarded as standing on the same foundation as a settlement made by the husband in consideration of a portion given after marriage by the friends of the wife.

And the court of Chancery will not only protect settlements after marriage made under its own immediate authority and inspection; but where the trustee of a married woman, before he gives up the trust property, stipulates with the husband for a settlement, comprising a reasonable provision for the wife, and dispositions for the benefit of the issue of the marriage, such settlement
281 will have the sanction of that || court, and the support of a constructive valuable consideration. The rule, however, has not extended so far in favor of the wife as to compel a restitution where the trustee has *voluntarily* resigned her fortune to the husband (2,) for her personal estate belongs to the husband, and the court can only withhold it as a cautionary pledge, from which it derives a power of imposing conditions upon the husband for the benefit of the wife. The court of Chancery refuses in such cases, where the money is not paid, implicitly to follow the law; but it will not enforce a restitution of what has been *legally* obtained (3). Neither, as it seems, will it interfere to restrain the trustee, from paying it to the husband. But if the trustee, before he pays to the husband the property or portion of the wife, insists upon a reasonable provision for the wife, he has only done *that* which the court would have done had the money been in the hands of a master, or had a bill been brought against the trustee to compel payment; so that the trustee, being in
282 a situation to compel payment to ||the husband, was, also, in a situation to raise a valuable consideration for such settlement though made after marriage. Thus, where J. S. having run away with a young woman (4), who had a considerable portion in the hands of her trustees, and being unable to obtain possession of her fortune without giving security to the trustees, that it should be settled for the benefit of the wife; agreed ac-

(2) Prec. in Chan. 414. but it seems that if a trustee pays to the husband after a bill filed, and particularly after a decree for a proposal, the court will consider it a payment by wrong and set it aside. vid. 4 Ves. Jun. 18.

(3) Vid. 2 P. Wms. 639; 3 P. Wms. 11; 1 Ves. 539; 2 Atk. 67, 420.

(4) Prec. in Chan. 22, Moor v. Rycault.

cordingly, that it should be laid out in lands to be settled to the use of the husband and wife, and the heirs of their bodies; upon a bill's being filed by a creditor of the husband, the court of Chancery would not consider the agreement, though *after* marriage, as voluntary, declaring that if the husband himself had exhibited the bill there against the trustees for the portion, the court would not have decreed it to him without insisting upon some such settlement, and the bill was accordingly dismissed.

In another case (5), C. having clandestinely married the daughter of M. entitled to a moiety of 12,000*l.* under her mother's marriage settlement, and the father ‖ of the young 283
lady having secured 6,000*l.* on his estate, made a settlement in consequence thereof upon his wife. After the death of the father, the trustees, seeing a settlement made, paid the money to the husband; and the question for the court was, whether such settlement was voluntary and fraudulent, or good and valid against creditors. The rule laid down in this case by Lord Hardwicke was as follows: "If a young lady is entitled to a portion secured by a trust term, which her husband cannot lay hold of, and possess, without the assistance of this court, and, because the trustees refuse to raise the portion, the husband comes here for aid, the court will decree an adequate settlement to be made on the wife, and will support it as a good settlement for valuable consideration. But (said his Lordship) the court has gone further; if the wife becomes entitled after marriage to such a portion, which the husband cannnot touch without the aid of the court, and the trustees will not pay it without the husband's making a settlement, to which the husband ‖agrees, and does *that* which the court would decree, it is 284
a good settlement against creditors." And no doubt can be entertained, but that it is equally good against purchasers; for these cases rest upon the same principle as those wherein the consideration arises from an *original* gift to the husband *after* marriage, by the friends of the wife; nor can it be questioned, but that the valuableness of this sort of consideration would be admitted in courts of law, as well as in the courts of equity, whence they derive their origin and force. We may add to these

(5) Wheeler v. Caryl, Ambl. 121.

cases the observation of Lord Hardwicke in *Browne* v. *Jones* (6). "If a woman, whose fortune is in the hands of her brother, marry indiscreetly, and the brother holds his hand, until the husband makes a provision, it is *honestly* done, and is no more than what the court would have done, and the court will equally support it, as if a bill had been brought against the husband to compel him to make a provision for his wife."

285 But it should seem, that, if the settlement by the || husband in a case circumstanced like those above mentioned, goes greatly beyond what the court would have enforced, it must be regarded as an unreasonable settlement, and fraudulent, as to the excess, against the creditors of the husband; such suppoposition, at least seems warranted by what fell from Lord Hardwicke in the case (7) of *Ward* v. *Shallet*, (*b*).

The same practice of imposing terms on the husband has prevailed as well where a married woman is entitled to a legacy in the hands of an executor, as where her property consists

286 of money in the hands of || her trustee. But as the ecclesiastical courts possessed a direct original jurisdiction in legatary causes, which were brought collaterally into the courts of equity by the frequent necessity involved in them of compelling a discovery of the testator's effects, (*c*) some scruples were

(6) 1 Atk. 190. (7) 2 Ves. 18.

(*b*) There may, perhaps, be some doubt whether the equity of the wife can be satisfied with a provision of less amount than her *whole* fortune, where the court has to direct the settlement; vid. Worrall v. Marrow, 1 P. Wms. 459. note; and Like v. Berresford, 3 Ves. Jun. 506; but the valuable consideration will, it should seem, clearly support it *up to* the full amount: and it seems a settled rule in equity not to consider the husband a purchaser by a settlement after marriage to the extent of decreeing him the wife's portion, unless such settlement was adequate to such portion, the diversity as to this point, is between a settlement *before* and a settlement *after* marriage; vid. 2 Atk. 448. per Lord Hardwicke.

(*c*) According to the present Chief Justice of K. B. it was not till the time of Ld. Chancellor Nottingham, that the jurisdiction of the court of Chancery over the question of legacies was established. Vid 5 T. R. 692. But it was the opinion of Twisden J. 1 Sid. 46. that testamentary causes did not *originally* belong to the spiritual courts, but to temporal courts and common law. 9 Rep. 37 b. and see Judge Buller's arguments in Atkins v. Hill, Cowp. 285.

expressed, in early cases, of the legitimacy of the pretension, which asserted, as a branch of equitable jurisdiction, this subject of marital claim (8). But these juridical scruples were neither general nor lasting; and it was freely declared by Lord Hardwicke in *Jewson* v. *Moulson* (9) above cited, "that the court of Chancery will not suffer the husband to take the wife's portion (though the ecclesiastical court, which has a concurrent jurisdiction in regard to portions arising || out of personal estate, may have consented to the husband's having it) 287
until he has agreed to make a reasonable provision for the wife, and in many instances has granted injunctions to stay the proceedings in the ecclesiastical court." In the case of *Nicholas* v. *Nicholas* (10,) a decree was cited at the bar, as of the then last seal, whereby the proceedings of a husband in the spiritual court for his wife's legacy were enjoyed, because that court could not oblige the husband to make an adequate provision for his wife, as the court of Chancery would do before it would permit him to receive the legacy. In *Adams* v. *Peirce* (11) the executor was plaintiff; but Macclesfield was clear as to the right of the court to impose terms on the *husband* if *he* had asked any aid in equity (*d*). A variety ||of subsequent decisions 288

(8) Vid Harrison v. Buckle, in Canc. 1 Str. 239; vid also 2 Ves. 18.
(9) 2 Atk. 420, and vid Tothill 114.
(10) Prec. in Chan. 548.
(11) 3 P. Wms. 11.

(*d*) The case of Povey v. Brown, Prec. in Chan, 325. which countenances the husband's power of destroying this equity of the wife by an assignment of her legacy for valuable consideration, is disapproved of by the weighty opinion of the present Master of the Rolls, in 3 Ves. Jun. 512. And we may remark that though a legacy is sometimes called, by persons fond of the dangerous exercise of discovering legal analogies, an equitable chose in action, yet that a chose in action at law, and a legacy, are rights most essentially differing in the contemplation of a court of equity itself, which, while it allows an assignment, for valuable consideration, of a chose in action at law, though purely of equitable operation, to defeat the wife's contingency by survivorship, treats the equity of the wife as attaching upon the person who claims, by assignment from the husband, the legacy of the wife, notwithstanding a valuable consideration has been give.

has set this question of equitable jurisdiction out of doubt (*e*) It follows, therefore, upon the same principle on which the cases of *Moor* v. *Rycault* and *Wheeler* v. *Caryl* above cited were determined, that a settlement by a husband on his wife, and the issue of the marriage, produced by a treaty with executors having in their hands a legatary portion of the wife, and declining to pay it over until such settlement should be made, stands on a
289 firm and ‖valuable consideration, and is perfectly good within the meaning of the statutes against fraudulent conveyances. Such was the doctrine of Lords King and Hardwicke in the leading cases of *Hinton* v. *Scott* (12,) and *Middlecombe* v. *Marlow* (13,) in which cases, though the settlement was contested by creditors only, the principle of the decision plainly extends to the claim by purchasers.

But as the valuable consideration of settlements made under the foregoing circumstances seems clearly to arise from the dependence of the husband apon the aid of the court (*f*); and the opportunity which is thence furnished of laying him under equitable stipulations for a just provision for his wife and family,
290 consistency suggests the inference that the valuable ‖consideration can only exist within the bounds of this equitable jurisdiction. Wherever, therefore, the husband can, by *assignment*, virtually and beneficially possess himself of his wife's interest, the rational ground fails whereon the valuable consideration appears to be raised.

[12] 2 Moseley 336. [13] 2 Atk, 519.

(*e*) Vid. 3 P. Wms. 202. and the references in Mr. Coxe's Note, and vid. Dicks v. Strutt. 5 T. R. 692. where Lord Kenyon declared himself against the remedy for legacies at common law, principally on the ground of the policy and expediency of leaving the question to a court which could impose terms on the husband for the maintenance of his wife and family.

[*f*] See the late case of Pringle v. Hodgson, 3 Ves. Jun. 617. where the settlement, by the husband, of stock standing in the wife's name, was declared void, though the wife was admitted to have a claim to provisions as against the husband's creditors.

SECTION XI.

Some diversity of opinion has obscured the question as to the operation of assignments of this sort of mixed or qualified interest. The effect, indeed, of a *voluntary* assignment by the husband of his wife's portion is clearly established, (1) and ever since the case of *Jacobson* v. *Williams*, (2) it has been settled law, that, though by the bankruptcy of the husband all such property of the wife as he could assign or release, passes to the general assigness by the assignment under the commission, (3) yet such assignees stand only in the place of the husband, and are subject to the same obligation in equity to make provision for the wife. *(a)* ‖The cases collected in the clear 492 and accurate note (4) of the last editor of Pere Williams, stated it as a questionable point, whether a particular assignnent of the wife's chose in action *(b)* or trust term by the husband ‖for a *valuable consideration*, was a case over 293

(1) 2 Atk. 420. (2) 1 P. Wms. 382. (3) 1 P. Wms. 251.

(*a*) Vid *ex parte* Coysegame, 1 Atk. 192, in which an obiter opinion occurring in Miles v. Williams, 1 P. Wms. 257, trenching upon the scope of this rule, was denied to be law by Lord Hardwicke; vid. also 1 Atk. 280, and Mr. Coxe's note, 1 P. Wms. 458, wherein the decisive result of the positive determinations of the courts as to this branch of the subject is concisely stated thus: "It is clear that the general assignees of the husband (whether by operation of law or *otherwise*) are subject to the same equity with the husband himself, and it does not seem be material whether the wife, husband, or his representatives or general assignees, come for the aid of the court;" See Grey v. Kentish, where the wife was a petitioner. Jewson v. Moulson, 2 Atk. 47. and the case of Worral v. Marlar, in Mr. Coxe's note, are authorities for the words of the parenthesis. See also 4 Bro. C. R. 139.

(4) 1 P. Wms. 458.

(*b*) The cases cited and the reasoning contained in Mr. Coxe's note, point only to a wife's choses in action in *equity;* we must therefore, the better to understand the subject, divest our minds for the present of all concern with *legal* choses in action; which by the arguments used in a future page, may appear to stand on a very different ground from *equitable* choses in action. It will be endeavored to be shewn, also, that trust terms and equitable choses in action of a married woman, are capable of being set in very different lights, as to the power of the husband over them.

which the court of chancery would exercise a control, by imposing terms in favor of the wife upon the particular assignee. In regarding the question as it affects the principal subject, it may be observed, that, if the jurisdiction of the court stopped short of this extent, a contract entered into by the husband for making provision for his wife, the benefit of whose portion (the ostensible consideration for such contract) it was in his power to obtain by assigning it for an equivalent, would want that *compulsory* ground which seems to form the *valuable* consideration in these cases.

Since the case of *Like* v. *Berisford*, (5) however, this doubt may be considered as removed by a decision which has fixed upon the basis of judicial authority the floating opinions of Lords Hardwiche and Northington. By that case it was decided, for the first time, by a decree, that if a husband make an actual 294 assignment, though for valuable consideration, of || the wife's property, *(c)* the equitable title of the wife to a provision is binding upon the assignee; which decision was expressly founded upon the reasoning of Lord Hardwicke in the case of *Jewson* v. *Moulson*, above cited, who there observed, that, if he were to allow such assignments to prevail, they would trip up all the care and caution of the court: for the husband would then have nothing to do but to take up money of a third person.

With respect to the choses in action of the wife to which the husband has a *legal* title, it has before been observed, that a court of equity, unless called upon for its assistance in respect of such property, will not interfere *(d)* with the husband's legal

(5) 3 Ves. Jun. 506. and vid. Pope v. Crashaw, 4 Bro. Chan. Rep. 326. and Macauly v. Philips, 3 Ves. Jun. 15.

(c) The Master of the Rolls, by denying the case of Povey v. Brown, Prec. in Chan. 325, shews that he blended legacies and trust monies in his consideration of this point; and there seems to be no ground for treating them as distinguishable in principle, as they are connected with the present subject.

(d) Neither, as it seems, will the court, where the wife has a rent charge, interfere with the husband's legal remedy by distress, in order to enforce a provision for the wife. Vid. 2 Atk. 514.

means of recovery. (6) ‖ The court of chancery has gone the length of allowing a bare *assignment* of a chose in action by the husband without *any* consideration, though void as to the assignee, to change the property and vest it in the husband. (7) But a different rule now prevails, and it seems to be perfectly settled that the wife's title by survivorship will not be disturbed by such assignment by the husband without *(e)* valuable consideration. (8) But with respect to such *legal* subjects, the wife can have no claim for a provision as against an assignee for ‖valuable consideration ; *(f)* for the husband was not origi- 296 nally subject to such claim, and it would be hard to set it up against one who gave a valuable consideration for the husband to reduce the property of his wife into his own possession without the aid of a court of equity, the court will not endure to see its salutary control eluded by circuity, considers the title of the assignee to be subject to a sort of paramount equity, which adheres to and passes with the subject.

(6) Vid. Milner v. Colmer, 2 P. Wms. 639. also 2 Atk. 420. where a doubt on this point is intimated by Lord Hardwicke. Winch v. Page, Bunb. 86. is considered as very doubtful authority.

(7) Vid. Squib v. Wynn, 1 P. Wms. 380.

(e) And it appears that beyond the consideration such assignment will not bind the wife surviving. 2 Atk. 208. 417.

(8) Vid. 2 Atk. 208. Bates v. Dandey; and 1 Bro. C. R. 44. Saddington v. Kingsman.

(f) It seems also that the assignees under the bankruptcy of the husband take the property in such debts of the wife, clear of any equity in her favor; 1 P. W. 251. 2 Atk, 418. et seq. for the assignees are only subject to the bankrupt's equities, and he might have reduced the thing in action into a thing in possession whenever he pleased. But it is clear that, in other cases, such interest of the husband in his wife's legal choses in action, will not *pass* without a valuable consideration. It may be regarded, indeed, as an universal rule in equity, that a valuable or good consideration is necessary to *pass* the thing where the attempted transfer operates wholly by equitable sanction, and raises a new title of pure equitable creation, as in the case of assignments of possibilities of legal estates and of choses in action. Though, where the transfer has its *effect* in equity, not because the *conveyance* itself is of equitable *operation*, but because the thing transferred is of equitable *cognizance*, as in the case of equitable vested estates, the transaction does not of necessity found itself upon any consideration.

‖A settlement, therefore, of a bare chose in action, stands differently circumstanced from a settlement of property, which the husband must borrow the assistance of equity to obtain possession of, and, if made after marriage, seems unshielded from the operation of that principle of conformity to the spirit of the statutes against fraudalent conveyances acted upon in courts of equity. *(g)*

The qualified maxim of *equitas sequitur legem*, to which we must resort for many of these distinctions, is admitted to apply with improved analogy where a judgment is given to a trustee in trust for a single woman, who afterwards marries, having by the consent of her trustee been put into possession of the land extended; for it seems clear that in such a case the husband
298 may assign over such extended interest, ‖notwithstanding the interposition of the trust, without *valuable consideration*, as without doubt he may in the parallel case at law, where a woman, who has a judgment which is afterwards extended by elegit, marries, for it is then no longer a chose in action but *res judicata*. In such a case, therefore, the court will impose no terms on the husband; and if he settles such a subject, after marriage, it seems to be a voluntary and fraudulent act within the meaning of the statutes against fraudulent conveyances. So, if the terms of a decree in favor of a feme sole, be to hold and enjoy land till a debt due to her be paid, and she is in possession of the land under the decree, and marries, the husband may assign such interest *without valuable consideration* (9,) for such equitable extent is construed by analogy to a legal extent, and we have seen what would be the husband's power if the extent were a strict legal execution.

(g) Money secured to a feme covert by mortgage, is upon a foot with her other choses in action. Prec. in Chan. 118; and the distinction formerly allowed between mortgages in fee and for terms of years, has long ceased to be law. Vid. 1 P. Wms. 458. and 2 Atk. 208.

(9) 3 P. Wms. 196.

SECTION XII.

|| This principle of following the law has also been observed in equity, in respect to *terms of years* held in trust for married women; and ever since the case of Sir *Edward Turner* (1,) determined upon appeal (2) to the Lords, it has been considered as competent to the husband to pass the interest in such equitable chattel real to his assignee, (except where it has been created for the wife *upon* (*a*) the marriage with the privity and consent of the husband,) unshackled by any equitable claim of the wife. And in a case (3) which soon afterwards came before the court, the authority of *Turner's* case was considered as 300 ||overthrowing a series of contrary resolutions, (*b*) and establishing the rule in favor of the husband; though at the same time Lord Nottingham animadverted upon the judgment given by the Lords in the former case with some disapprobation. In *Tudor* v. *Smayne*, (4) the case of *Sir Edward Turner* received a further confirmation. There, the husband having made an assignment of the trust term of the wife, a bill was brought by the assignee against the wife and her trustees, to compel them to assign over the legal estate in the term to the plaintiff; and it was decreed accordingly, though it was strongly urged by the counsel for the defendant that no settlement or provision had been made by the husband, and that if *he* had been the plaintiff instead of his assignee, the court || would not have decreed the trustees to assign to him the 301

(1) 1 Vern. 7. and Gilb. Lex Prætoria, 279.

(2) See the decree from which the appeal was made, and which was reversed by the judgment of the Lords. 1 Chan. Ca. 306.

(*a*) But where the term is voluntarily created by the husband *after* marriage, in such case effect is given to a subsequent alienation by the husband for valuable consideration by the 27 Eliz. c. 4. Vid. 1 Chan. Ca. 306.

(3) Pitt v. Hunt, 1 Vern. 18.

(*b*) Vid. the case of Doyley v. Perfull, 1 Chan. Ca. 225. where it was said that, since Queen Elizabeth's time, it had been the constant course of the court to set aside all incumbrances and acts of the husband upon the trust in the wife's term, and to allow him neither to charge nor grant away.

(4) 2 Vern. 270.

legal estate, without his first making a provision for his wife; and the then plaintiff, who derived under him, ought not to be in any better condition. The reason and nature of the thing seem to warrant an inference that a mere *voluntary* assignment by the husband of his wife's trust term should be good against her claim. In *Lord Carteret* v. *Paschal*, (5) it was said, that the perfection of the husband's interest, where the wife had an equitable extent (such as the decree, on which the claim in that case was founded, was adjudged to amount to,) gave the husband power to assign it *without* consideration; which opinion of the court was founded on the analogy which ought to preserved between executed legal and executed equitable interest. And such case of an equitable extent was compared by the chancellor to the case of a wife's trust of a term. So that it appears to have been the opinion of Lord King that a married woman's trust of a term was an equitable interest capable of being assigned by the husband *without* consideration as against the wife herself.

302 ‖ Consistency can only be maintained by an adherence to principle. None of the authorities which have adjudged this disposing power to the husband over a trust term of his wife, have taken any distinction between *voluntary* and *valuable* assignments; though such a doctrine has crept into all the modern abridgments and compilations.

There may be a difference as to the husband's interest, between such trust terms of the wife as are *vested*, and such as are *contingent* and *executory*. For since a mere contingent and executory interest in a legal term could not be assigned at law, there is no *legal* analogy to govern the effect of the assignment in equity; and as the assignments of such interests have wholly their foundation in equity, to insist upon a valuable consideration or fetter them with conditions in favor of the wife, seems no improper exercise of equitable jurisdiction.* And there is good

(5) 3 P. Wms. 39.

*Where a term is assigned in trust for a wife, by a first husband, her second husband can alien the term; but not where assigned in trust for her by her husband's consent: so if assigned in trust for her separate use. 2 Vern. 270. And if to raise a sum of money for her instead of the term itself being

reason and authority for saying, that a man cannot assign the *legal* interest in his *own* term, so as to bind his representatives, ‖if such interest be only a possibility or contingency, 303 without a consideration *(c)* either in the first or second de-

[c] The reason for the necessity that exists for a good consideration to support such assignments of contingent, legal or equitable, interests, (for whether the subject be legal or equitable, the assignment has its *operation* only in equity,) is found in that principle of equitable construction, by which they are looked upon in the light of contracts or agreements, which, to entitle them to the assistance of the court, must be founded at least upon a *meritorious* consideration. For equity will not be moved to interfere with the law, but where either a purchaser in the first or second degree claims its assistance. And its practice in this respect seems to turn upon the rule, that, whatever it will do for a *valuable purchaser*, it will do for a *wife* or *child*, which is a secondary sort of purchaser in equitable consideration, where no creditors or other valuable claimants appear agaist mere volunteers. And it seems to follow, that wherever a court of equity will uphold an assignment of a legal executory interest, it will support an assignment of a parallel interest in equity, for otherwise it would not merely offend against the rule of *equitas sequitur legem*, but commit an inconsistency with itself. But since, where the assignment is made by a person interested in his own right, equity will lend it no countenance unless it possess the merit of a good or valuable consideration; so where it is an assignment by a husband of such legal or equitable contingent interest of his wife, there must necessarily be a *valuable* consideration to support it, for a consideration in the *second degree* cannot prevail against the *meritorious* claim of the wife.

But to pursue the subject a step further; if the equitable or legal contingent interest of the wife in her chattel expectancy be such, as that it cannot become *vested* in her during the husband's life, as where a term is given to or in trust for the husband and wife and the survivor, it may reasonably be doubted whether equity will give effect to an assignment by the husband of his wife's interest even for *valuable* consideration. For there must be some rules of conformity to limit this equitable jurisdiction; and it may be observed that, in all the instances wherein it has given operation to the assignment of this species of interest, the law itself, where the subject has been legal, has presented some mode either by fine or release of effecting the alienation of the thing. But of such an executory and contingent interest of the wife at law, the husband has no *legal* means of disposing *by himself*. By fine he cannot without the concurrence

a trust for her, makes no difference; here the assignment in trust for her was before her marriage. Yet if money be left in a trustee's hands for the wife's benefit, and the husband dies, it goes to her, he not having disposed of it. Turner's case. 1 Vern. 7; do. 161.

gree.(6) But there appears to be no difference, as to the effect of the husband's assignment, between a term in trust to raise a
304 sum of money for a woman, and || the trust of the term itself, or an equitable chattel real, for where such supposed diversity was urged at the bar in the case of *Walter* v. *Sanders* (7), the Master of the Rolls refused to listen to the distinction, and held himself bound to decree (though, as he said, against
305 his conscience) in conformity with the solemn || judgment given in the case of Sir *Edward Turner*.

So in a subsequent case (8) it was taken by the court to be well settled, that where a wife has the trust of a term, the
306 husband has an absolute power of || disposition over it. In Lord *Carteret* v. *Paschal* (9) the same doctrine prevailed, and it was considered as furnishing a principle applicable to the cases *there* put of equitable extents. The rule was acquiesced in by Lord Hardwicke in the case of *Bates* v. *Dandy* (10), and again afterwards in the great case of *Jewson* v. *Moulson* (11)
307 (*d*) In a very late case the same doctrine || was reluc-

of the wife; neither, as appears in *Lampet's* case, 10 Rep. 51. a. and vid. 1 Rep 90. a. 111. b. Popham, 5. 1 Salk. 324, can he reach it by assignment or release. If, however, such interest of the wife in a term of years is created by the husband himself after marriage, as in 1 P. Wms. 364. *Watts* v. *Thomas* where the husband purchased a term for years to himself and his wife and the survivor, and the executors, &c. of such survivor; the husband may clearly, by operation of the statute 27 Eliz., alien such contingent interest of his wife, by a simple assignment at law for valuable consideration. If he only mortgages it, whereby it is converted into an equitable chattel after the forfeiture, the equity will survive to the wife, but not, as it should seem, as against the husband's creditors, even though their debts were contracted subsequently to the settlement.

(6) Vid. 1 Ves. 411. (7) 1 Eq. C. Abr. 58.
(8) Prec. in Chan. 419. (9) 3 P. Wms. 200.
(10) 2 Atk. 208. (11) 2 Atk. 421.

(*d*) It has been said (vid. Treat. of Eq. Fonbl. note o. to sect. 6. book 1.) that the case of Strathmore v. Bowes, 2 Bro. C. R. 345 has considerably weakened the authority of these cases. In answer to which observation it may be remarked, that in the case of Sir Edward Turner and of Pitt v. Hunt, it was the particular nature and quality of the interest that attracted the marital claim, and those cases turned upon no question of fraud upon the husband. In Strathmore v. Bowes, the claim of Bowes depended upon the question, wheth-

tantly recognised by the present Master of the Rolls, who seems to doubt whether the (12). principle upon which the court of Chancery has exercised a control over the disposition of this sort of property, can consistently stop short of any case where the subject is of equitable cognizance, and not to be come at by legal remedies. Until a future decision shall remove this respectable doubt, it may not be presumptuous to call the reader's attention to some lineament of an essential distinction, which discriminates the practical ground of relief in these kindred cases.

In a view to this particular branch of inquiry, viz. the effect of the husband's assignment of his wife's property, such property may perhaps admit of a nominal division into choses in action—suspensive executory trusts, and executed absolute trusts. With respect to the first denomination, we should bear in mind that a chose in action is a mere legal right, with which, as a right, courts of equity have nothing to do; as a right || it seems (*e*) 308 to be subject to no equities. But a *right* to a *benefit*, is regarded as an *interest* by courts of Equity, which, contemplating the interest as abstracted from the right, allows it to be separately aliened, and to be treated as a distinct subject of negotiation and transfer. As no equity seems originally to be attached to the thing, it must spring up in the very act of separating the interest from the right. But, since, where the husband is entitled to a thing in action in right of his wife, he must join his wife with himself in an action to recover it; and, in the mean time, the wife has a chance of benefit by survivorship, the court will not give effect to the transfer by carrying the divided interest or equity to the transferree in destruction of the contingent expectation of the

er the court would consider the power of disposition which the widow had created for herself and which was such by its own nature, as that, if suffered to exist at all, it could not become a thing disposeable by the husband, as a fraud upon the marital rights. In Turner's case, as well as in those of *Pitt v. Hunt* and *Tudor* v. *Smayne*, the husband did not found his pretensions upon this right to *overthrow* the interest which had been created, but upon his right by *legal consequence* to the disposition of it.

(12) Vid. 3 Ves. Jun. 19. Macaulay v. Philips; and vid. Pryor v. Hill, 4 Bro. C. R. 139.

(*e*) Some doubt is cast over this part of the description by what occurs in 2 Atk. 420. and Bumb. 86.

wife, unless the assignment is supported by a valuable consideration; for the rule is, that no *new equity can spring up* in favor of a mere volunteer in derogation of an antecedent interest, however minute.

But the courts of Equity, having allowed and sanctioned
309 || the conveyance of such untangible interests, would seem to contradict and defeat their own principles and objects by denying to such a conveyance the effect of a plenary transfer; and their general object of facilitating the interchange of property by rendering it more pliable to the occasions of commerce and society, would be frustrated by their own outrageous caution in subjecting the purchaser for valuable consideration to an equity which was not originally attached to the thing itself, and holding him liable to the moral obligations of another, which there was no equity to enforce, *before* the alienation, against the party himself standing in the relation to which such moral obligation referred.

Where the property of the married woman is in the tangible shape of money, the trust respecting it may be called *suspensive* and *executory*. Here, as there is no way for the husband to enforce payment, but by the compulsory interference of a court of Equity, an original equity becomes attached to, or if it be not
310 too bold a phrase, consubstantiated with the thing itself. ||The trustee or executor is in such a case the active medium through which the bounty is to be carried home to the object; it is a directory charge upon their consciences, and receives its completion at their hands. They are not to *hold* but to *do* something for another; they have no *estate*, which can be answered by a correspondent equitable estate in the *cestui que* trust or legatee, but have simply an office to discharge. The thing given moves in one line of direction from the donor to the donee without the creation or supposition of two coeval and correspondent estates in law and equity.

But as, in these cases of legacies and trust monies, the trustee or executor has a duty to perform, before the gift is perfected, which duty the aid of the court is requisite to enforce, the rule that exacts the performance of equity before equity can be granted, raises an original equity in behalf of the wife. The equity, therefore, in this case, having sprung up *before* the alienation, there seems to be no reason for construing the assignee to be in

a better condition than the person || under whom he claims. But a strong argument from inconvenience and absurdity accedes to this reasoning from the nature of the thing, since, according to the observation before borrowed from Lord Hardwicke, if such assignment were suffered to prevail, an easy circuity might frustrate the solicitude of the court for the maintenance and protection of married women.

Trust terms are among the *absolute* or *executed* trusts which form a distinct class in the consideration of this sort of property. Being equitable interests *originally*, their very constitution differs from that of choses in action ; and, as an assignment of such an interest does not draw its immediate operation from any equitable construction supplying its deficiency of force at law, but belongs to the nature of the thing, the same necessity for a consideration to effectuate the conveyance, and alter the property, seems not to exist, as where the transfer being unauthorized at law, can carry no benefit to the assignee, but by first *raising* an || equi- 312
ty between the parties. The necessity for an universal agreement in the rules of all courts relating to estates in land, which has given birth to the maxim of *equitas sequitur legem*, suggests the reason of the distinction that plainly exists between the monies and legacies of a married woman in the hands of her trustees and executors, and her equitable interest in terms of years, which, being unintelligible but by reference to their correspondent estates at law, seem to depend for their very essence and attributes upon a strict analogy of rule and construction.

The maxim therefore of *equitas sequitur legem*, and the rule of expediency, seem to require that the power of disposition by the husband in this case of a trust term of the wife, should not be fettered by executory obligations, and pass to the assignee defalcated of its value by extrinsic claims, and the interference of a discretionary jurisdiction ; and if the rules of law have the similitude of science, we must distinguish, as to the effect of an assignment by the husband, between || the wife's pecuniary por- 313
tion, which is to have its effect through the medium of an active duty in the trustees, who are the depositaries of the thing itself, and effectuators of the donor's intention, and a trust term descriptively ascertained and limited, constituting a visible estate in the *cestui que* trust, clothed with the same quality of transfer-

rability as a perfect common law estate, and differing from it only by being the object of the peculiar jurisdiction of a court of Equity. (*f*) In the first case we view the subject as a
314 || mere fiduciary deposit,—a thing of manual transfer, in respect to which, the court of Chancery will make use of the necessity for its interference as an instrument of occasional control, whereby the husband, who calls for equity, may be obliged to *do* equity. But we are justified upon the true spirit of the maxim of *equitas sequitur legem* in viewing all trust terms as estates of a measured quantity and definite interest, not depending on a flux discretionary jurisdiction, but on a fixed and scientific basis of legal analogy. (*g*)

These observations may furnish some ground for a more accurate delineation of the distinctions affecting the marital power over the several kinds of trust property, to which a married
315 woman may be entitled; for ||that there *is* a difference in *principle* between the legacies and trust monies, and the trust terms of a married woman, is a proposition as clear as the diversity between personal chattel or moveable property, and estates in land, which last should have the same measure in law and equity, and call for an analogy and correspondence of decision.

The connection which the learning on this point has with the subject of this essay will be found in the dependence which the

(*f*) The principle of this distinction may be traced back to very high legal antiquity. The special directory trust is noticed by Lord Bacon, in his reading on the Stat. of Uses, p. 9. as being very different from the general and *permanent* trust, which was properly the *use*. These distinct sorts of uses or trusts, before they became the object of any statute, differed no less in their construction and effects than in their nature and extent. See the observation in 12 Rep. 26. They have been compared to the *jus precarium* and *jus fiduciarium* of the civil lawyers. The equitable estates in real property, adverted to above, are the legitimate descendants of the ancient *permanent* uses, which, upon the old maxim of *equitas sequitur legem*, were always descendible, in a course analogous to estates of inheritance at the common law.

(*g*) See what was said by Lord Nottingham, in his second argument in the Duke of Norfolk's case, on the correspondence between the rules of equity and common law as to terms of years, Chan. C. 48. and see the argument of Lord Keeper North in the same case, 1 Vern. 164.

question as to the voluntariness or valuableness of settlements made by husbands under the circumstances above supposed, must have upon the *preliminary* question, i. e. whether a court of equity will extend to the particular case its compulsory interference.

SECTION XIII.

‖ The settlement which takes place upon the separation 316 of the married parties, is an important branch of this subject. The books contain but few cases upon the validity of such settlements as against purchasers and creditors; and the result of such resolutions as are to be found upon the question, seem to rest it upon the alternative of the insertion or omission of a covenant by the wife's friends or trustees to indemnify the husband. It would seem inconsistent, if the mere interruption of the marriage union, without the authoritative interference of a court of Spiritual Judicature;—of that union, which the common law regards as so weighty and valuable a consideration, could be *of itself* an available consideration as against creditors and subsequent purchasers. But, as a husband's rights and a husband's obligations form a reciprocal ground for stipulation and contract, it seems to have been holden that ‖where 317 there are are parties to contract, a covenant to indemnify against the one, may be a fair and sufficient consideration for a retrenchment or abandonment of the other. Maintenance of a wife and children, however pressing as a moral duty, is generally no answer to valuable purchasers, or to creditors whose debts were prior to the settlement; and there seems to be nothing in the mere separation by agreement to attract any greater regard. But where the husband purchases an exemption from charge by the contract of separation and maintenance, he has apparent motives of pecuniary influence, and a stipulated return in value for the interest or property he parts with. And such a settlement for separate support has in it, perhaps, more of the quality of a veritable and peremptory contract, than where a

settlement after marriage for the separate use of a wife, being made in prospect of continuing harmony and cohabitation, promises to the husband a resulting share in the benefit ostensibly transferred.

318 But independently of this collateral covenant to || indemnify the husband, a deed of separate maintenance, must be looked upon as having a very precarious operation as between the parties themselves. Our common law, which breathes so much reverence for the matrimonial contract, has made no provision for capricious separations; but regarding marriage as a rite of scriptural ordination and primæval sanctity, has left to the spiritual judge the cognizance of its social and moral concerns. Thus the law looks to the duration of the union of marriage as commensurate with the lives of the parties, and has not incurred the reproach of inconsistency by raising a valuable consideration out of the dissolution of that engagement which it regards as the most valuable of all considerations. And so tender is the policy of the English jurisprudence of lending countenance to divorces, that it has been authoritatively said (1) that no court, either of temporal or spiritual jurisdiction, has an *original* authority to give a separate maintenance to a married woman.

319 It seems agreed, that the ecclesiastical judge holds || his power of decreeing alimony as *incidental* to his natural and authentic jurisdiction. (*a*) Though the supplicavit in Chancery is of itself only a security for the wife upon the supposition that she is to live with her husband, yet it has been said, that where it is necessary for the security of the peace, that the husband and wife should live a part; this process has drawn to itself an *incidental* power of a similar kind to that above mentioned. (2) But it has been laid down as contrary to the doctrine of that court to entertain a suit by a married woman for separate maintenance, as

(1) Vid. Ves. Jun. 191.

(*a*) The incidental power of the ecclesiastical court to decree alimony on a decree *propter Sævitiam* has not been doubted; but these decrees for alimony affect no part of the husband's estate, so as to take it from creditors, but are merely against the person of the husband.

(2) 2 Ves. Jun. 195.

a substantive and primary object of her bill (3). And the cases of *Oxenden* v. *Oxenden*, (4), *Williams* v. *Callow*, (5), and perhaps *Watkyns* v. *Watkyns* (6), have been over-ruled by the cases of *Head* v. *Head* (7), and *Ball* v. *Montgomery* (8). It seems indeed, to have been considered till lately || as set- 320
tled law, that wherever there has appeared in such cases of separation an express or implied agreement *(b)*, the court of Chancery has the power of decreeing a separate maintenance.— But the importance of this distinction between the cases which have, and those which have *not* rested upon an agreement between the parties, may be considered as somewhat questionable, since the modern case of *Legard* v. *Johnson* (9), in which the court of Chancery cautiously mistrusted its own competency to break in upon the integrity of || the common law *(c)*. 321

(3) 2 Ves. Jr. 195. (4) 3 Vern. 493. (5) 2 Vern. 752.
(6) 2 Atk. 96. (7) 3 Atk. 547. (8) 2 Ves. Jun. 191.

(b) A divorce in the ecclesiastical court has been considered as raising this implied agreement.

(9) 3 Ves. Jun. 352.

(c) If this and other adjudications subsequently noticed in the text, which have manifested a similar spirit, have really laid any foundation for future consistency and firmness of doctrine on this subject, besides their salutary recognition of legal principles, we shall be indebted to them for relieving us in part from the labour of exploring our way amongst obscure and dubious cases.— The four cases of decrees for alimony in the court of Chancery which occur in the book called Chancery Reports, viz. Lasbrook v. Tyler 24, Lady Ashton v. Ashton 87. Russel v. Bodwill 99. Whorewood v. Whorewood 118. are shortly and loosely stated; and it does not appear whether or not any of them were supported by proceedings in the ecclesiastical courts, or by any agreements between the parties. The three last cases, which were decided during the usurpation, and while the spiritual jurisdiction was suspended, by commissioners expressly empowered to decree alimony, and confirmed by the act for confirming judicial proceedings, are not authorities as to this point of jurisdiction. Williams v. Callow, and Watkyns v. Watkyns, referred to in the text, are cases wherein this jurisdiction has been exercised by the court of Chancery without any foundation in the agreement of the parties. In the case of Sealing v. Crawley, 2 Vern, 386, and the late case of Guth v. Guth, 3 Bro. C. R. 614. the court appears to have proceeded upon the *agreement* of the parties. In Angier v. Angier, Prec. in Chan. 497. written Engier v. Engier, in Reg. Lib. there was an agreement, and also some other very strong ingredi-

The Lord Chancellor in that case was of opinion, that upon a question of power || in the court, upon a general case of articles of separation founded upon mere discordancy of temper without reproach on either side, to carry into effect a deed of separation between husband and wife, he could not state the contract to be higher in point of law than a personal contract between the husband and wife *stante matrimonio*; (*d*) but
323 that the case before || him compelled him to go further, and to consider that contract a separation by which the husband and wife exclude and exonerate each other from the rights and duties arising from matrimony. His lordship cited the cases of *Mildmay* v. *Mildmay* (10), and *Hincks* v. *Nelthrope* (11), in both which cases the court refused to entertain any jurisdiction upon a contract between husband and wife. It was observed also by his Lordship, that in the case of *Head* v. *Head* (12), Lord Hardwicke had expressed the same opinion as to the defect of jurisdiction in the court, and had said that where the court interfered, it had very unwillingly acted at all.

ents to justify the interference of the court. In Nicholls v. Danvers, 2 Vern. 671. as appears from the Register's book, though not in the report of the case in Vernon; and in Baron Gilbert's report of Oxenden v. Oxenden, a sentence of divorce had been obtained in the ecclesiastical court. Though in the last mentioned case, as it is reported in Prec. in Chan. 239. the court seemed to disclaim any assertion of power to decree a separate maintenance, and to chuse rather to rest its authority on its control over the fund as being in the hands of trustees. In Head v. Head, 1 Atk. 295. Lord Hardwicke seemed to think that the jurisdiction of the court of Chancery in respect of these decrees of separate maintenance ought to confine itself to cases of agreement, trust, and a previous sentence in the spiritual court. The modern cases cited in the text have an apparent tendency to abridge the controversy, and perhaps to close the debate on some of these distinctions for ever.

(*d*) These cases of separate maintenance seem all very distinguishable in principle, as they are connected with the present subject, from those which have frequently arisen upon the elopement of the wife entitled to separate property provided for her by articles before marriage, wherein it has been determined that to a bill brought by the wife for specific performance, it was not an answer for the husband to say, that the wife had eloped, and lived in adultery. Vid. Sidney v. Sidney. 3 P. Wms. 268, and the case in the note subjoined by Mr. Coxe.

(10) 1 Vern. 53. 2 Chan. Ca. 102. (11) 1 Vern. 204. (12) 3 Atk. 395. 547.

Upon this opinion of Lord Hardwicke, the present Chancellor further observed, that the cases in which the court had acted thus unwillingly, were first, where a third party had intervened, as where a third person, with whom the husband might contract, bound himself to indemnify the husband against the debts of the ‖wife, which raised a proper consideration. (13) 324 The second order of cases in which there was a plain ground for the court to go upon, was where a fortune accrued to the wife *after* separation, and the court was applied to for making some provision for her out of it (14). "For if," said his Lordship, "it happens from the situation of the parties, that they cannot enjoy in common *that* which should maintain *both*, it would be very hard that the party from whom it moves should lose and the other should gain the *whole* benefit of it." The Chancellor then mentioned as a third sort of case wherein a court of Equity might take into consideration the duties arising from the relation of marriage, *that* wherein the property being in trust could only be sued in equity. He was, therefore, of opinion, that the incompetency of the court to enter into the consideration of the rights and duties arising from marriage was an answer to the bill; and upon the general abstract question, he observed, that he had met with no case except *Guth* v. *Guth* (15) (which he should wish another account of, as his ‖opinion inclined against it) to entitle the court to hold such 325 a jurisdiction.

The principle of this case, though it imports a tendency to restore to the spiritual jurisdiction its proper cognizance, seems evidently to be grounded on the adoption of an ancient legal maxim which has been skaken by a case determined in the court of King's Bench (16) in the time of the late Chief Justice. In that case the positive rule of law, according to which a married woman can acquire no property, real or personal, and is under an incapacity to contract, was said to have given way to the prevailing customs and manners of the times, and to the more con-

(13) Vid. Sealing v. Crawley, 2 Vern. 386. and Angier v. Angier, Prec. in Chan. 497.

(14) Vid. Nicholls v. Danvers, 2 Vern. 671.

(15) 3 Bro. Chan. Rep. 614.

(16) Corbett v. Poelnitz, 1 T. R. 5.

venient doctrine (17) by which a feme covert, assuming the appearance of a feme sole, is *to all intents and purposes* capacitated to act as such. And by the judgment of that court it was implicitly resolved, that a husband having settled a separate maintenance upon his wife by deed, was totally and ultimately discharged at law from her debts and contracts. If that case, and others of the same complexion, and the opinion of the
326 court ‖expressed in *Angier* v. *Angier*, have finally reformed the law in this respect, there seems to be but little ground for the scruples of the court of chancery in any case to decree a specific performance of articles of separation; since if the separation be complete in law, and the husband has thereby a perpetual and radical release from his marital obligations, the court, as it should seem, can consistently feel neither want of jurisdiction nor want of consideration as an obstacle to its interference; neither, as it appears, will there exist any good ground for the distinction between cases *with* and *without* the ingredient of a covenant from a third person for the indemnification of the husband, which has hitherto governed the decisions of the courts in questions between parties claiming under such separate maintenances by deed, and persons coming in upon valuable considerations, under the statutes of Elizabeth. But the courts, both of law and equity, have viewed with jealousy and signs of disapprobation the case of *Corbett* v. *Poelnitz*. They have not adopted its general positions; but by subsequent deci-
327 isions its ‖authority has been reduced to cases of perfect circumstantial coincidence. In *Hyde* v. *Price*, (18) the Master of the Rolls brought into view all the cases on the subject, and added to his own the doubts of Lord Kenyon, expressed in *Ellah* v. *Leigh*, (19) and *Clayton* v. *Adams*. (20)

Whether a feme covert sole trader by the custom of London, was liable to be sued in the King's Courts upon her contracts without her husband, (the question as to her power of suing without her husband having been determined in the negative in case of *Caudell* v. *Shaw*, (21) has recently been decided by the judges of the exchequer chamber in correspondence with the

(17) See the answer to this sort of argument in Manby v. Scott, 1 Sid. 109.
(18) 3 Ves. Jun. 437. (19) 5 T. R. 679. (20) 6 T. R. 604.
(21) 4 T. R. 361.

ancient rule of law as to the general legal incapacities of a feme covert. (22) A difference, however, has been attempted to be taken between this case of a feme covert sole trader by the custom of London, and a feme covert *living apart* from her husband, as to the question under consideration; for while it has been admitted that in the first case the husband by reason ‖of his retaining his interest in the person and 328 liberty of his wife, though not in her effects, ought to be made a co-defendant, it has been contended that the total annihilation of the husband's interest in the person as well as the property of the wife enjoying a separate support secured to her by deed, gives to her the entire capacity to sue and be sued, *(f)* and to charge herself personally as a feme sole. But this is taking *pro concesso* a supposed effect of the deed of separation, which may not so readily be allowed. It seems by no means clear that the parties, notwitstanding such an instrument, may not prosecute in the spiritual court for a restitution of conjugal rights, and, as was observed by the present Chief Justice of the Common Pleas in the case above referred to, it remains to be seen whether such court would hold it in the power of ‖the parties themselves to dissolve any of the duties of that 329 particular contract which was formed in the presence of God, and whether in such case the courts of common law would grant a prohibition.

If the husband can be discharged by contract with his wife from all possible liability to her future debts, then are the rights and duties arising upon connubial connection dependent upon the will and caprice of the married parties. This seems to be the true state of the question; for if the husband can discharge himself by such contract with the wife, the barrier is burst by admitting her deed to be good in law; and after this it should seem to be an inconsistent scrupulosity to require the husband to be made defendant in actions upon the contracts of the wife,

(22) Beard et ux. v. Webb et al. C. P. Hil. Term, 1800.

(f) In Gordon v. Halpen et ux. though the settlement of the wife's property upon her was confirmed by a decree of the House of Lords to be for her separate maintenance, Lord Hardwicke, C. J. would not permit a severance in pleading. Vid. ca. temp. Hardwicke 101.

while living on a separate maintenance settled by deed. It appears then, that the doctrine which discharges the husband, and capacitates the wife to be sued without him, where they are separated by deed, must involve the proposition that the
330 relation of marriage is wholly submitted to ‖their spontaneous motions, and, except to the purpose of a second marriage, a momentary discord may disunite the most sacred and important of civil and religious connections.

This absolute and final discharge of the husband from the debts of his wife, contracted during her separation from him, seems to have been admitted in *Angier* v. *Angier*, above cited, and to have been decided (perhaps not irrefragably) in the cases of *Ringstead* v. Lady *Lanesborough* (23), *Barwell* v. *Brookes* (24), and the before mentioned case of *Corbett v. Poelnitz*, which seemed to turn wholly upon the *postulatum* that the husband, in such cases of separation by deed, has a plenary discharge at law *(g)*; and that being not liable to the debts of his wife or
331 amenable to ‖ judgment or execution, it were absurd to insist upon his being joined in the action. But the *postulatum* is the point in dispute; a very different sense of the exigency of legal principle and legal policy was entertained in *Hatchett* v. *Baddeley* (25), and *Lean* v. *Shutz* (26), by the judges who decided those cases. And particularly in the first mentioned of those cases, the peril of inroads upon fundamental maxims was forcibly illustrated by example. Courts of equity have on this question felt the danger of disturbing the elements of law. Where these courts have fully established the dominion of a married woman over her separate property *(h)* and having decreed trustees

(23) Co. Bank. Laws, 29. (24) Id. ibid.

(g) If such deed can operate as an absolute and final discharge of the husband, and to endue the wife with the legal capacities of a feme sole, consistency and uniformity require that all those opinions must cease to be law which assert the husband's control with respect to such personal property as accrues to the wife after her separation. Sed vid. Palmer v. Trevor, 1 Vern. 261.

(25) 2 Blackst. 1081. (26) 2 Blackst. 1195.

(*h*) This power in its full extent seems to have been doubted by Lord Hardwicke in the case of Peacock v. Monk, 2 Ves. 191. but the point seems to have been settled in the affirmative by the case of Wright v. Cadogan, 6 Bro. P. C. 156.

to convey according to her directions, they have prudently shrunk from the proposition that a wife can charge herself *personally*, and have refused decrees to || compel her to perform 332
her *personal* engagements or to bind her real estate to the fulfilment of her *general* obligations. (*i*)

But the generality even of this rule, establishing in equity the absolute control of a wife over her separate property, has been restrained by a late case (27) determined in the court of Chancery; the judgment of which case seems to suppose a clear distinction between the provision of a married woman settled upon her after marriage by way of separate maintenance, and property limited by the marriage articles or settlement to her separate use, as to the extent of her dominion over it; and the Master of the rolls seemed to be of opinion that a feme covert has only the usufruct without a power of alienation with respect to that property which constitutes her exclusive support under a deed of separate maintenance. The peculiar destination of this property annexes according to the reasoning of || that case a necessary limi- 333
tation to the wife's interests in it and power over it; and this doctrine turns, as it should seem, upon the husband's being onerated at law with his wife's suitable expenses notwithstanding the deed of maintenance. Agreeably to which opinion it was observed in the argument for the defendant in *Lean* v. *Schutz* above cited, that the agreement being for the special purpose of separation ought not to be carried beyond it; and though the arguments of counsel are not meant to be referred to as authorities, yet it may not be irregular to remark that in the reasoning on the defendant's side in that case, will be found in a short compass some of the strongest grounds in support of the ancient rule of law. Our attention is attracted by the cogent remark of the Master of the Rolls in *Hyde* v. *Price*, viz. that it was not determined in *Corbett* v. *Poelnitz* what was to be the case if the wife should become a pauper; could not the parish call upon the husband to maintain her? And we are reminded by a modern writer (28) that the cases of *Ringstead* v. *Lanesborough*, *Barwell* v.

(*i*) This seems to be the true sense of the case of Hulme v. Tenant, 1 Bro. Ch. Rep. 16.

(27) Hyde v. Price, 3 Ves. Jun. 437. (28) Fonbl. Eq. Tr. B. 1. s. 6. note p.

Brookes, and || *Corbett* v. *Poelnitz*, (though they have been supposed to furnish a general rule of law,) do not advert to the adequacy of the separate maintenance, or to the circumstances of the husband at the time of securing it.

We may extract from the gravest authorities the following simple propositions. A woman by her marriage becomes to all legal purposes *one* with her husband. In consideration of law he cannot separate his wife from himself for the purpose of making a gift to her of any part of his property real or personal (*k*) so as to vest in her an exclusive right during his life. A wife has no inherent original power of contracting even for necessaries against his consent, but her power of charging him for necessaries
335 and things || suitable to his degree, is founded on a reasonable presumption of law, which implies his assent to her being furnished with such things as are necessary to her support. Her contracts to this effect are construed as being made with his authority and to his use. (*l*) The jury are the judges of this implicit assent. If a husband allows his wife a separate maintenance, while that support continues, the implied promise is satisfied and performed, and generally the husband making such allowance is not liable for the debts of his wife. So it was ruled in *Todd* v. *Stoakes*. (29) But we may infer from the distinctions taken in that case, that it is not the contract or deed of the husband which discharges him; for if the articles of separation in *Todd* v. *Stoakes* had by their own force exonerated the hus-
336 band, there would have seemed to be some || inconsistency in the subsequent remark in that case; for the Chief Justice observed, that if the wife had come immediately from her husband after the separation, and before it could be generally and publicly known, and had taken up necessaries upon credit, the

(*k*) Co. Litt. 3. courts of equity have recognized and respected the rule;—vid. Moyse v. Giles, 2 Vern. 385. Beard v. Beard, 3 Atk. 72. But it must be confessed that in many cases these gifts have been supported in equity. Vid. Stanning v. Stiles, 3 P. Wms. 334. Bell v. Hyde, Prec. in Chan. 328. Moore v. Freeman, Bunb. 205. sed vid. Legard v. Johnson, cited supra, 320.

(*l*) The eight judges for the defendant in Manby v. Scott, 1 Sid. 120. were agreed in this doctrine. The whole twelve agreed that the wife could in no case contract so as to charge herself.

(29) 1 Salk. 116. Lord Raym. 444. coram Holt C. J. Ni. Pri.

husband would have been liable. If the contract with the wife had been *per se* an exemption to the husband from all future liability, the husband's case could not have been affected by circumstances *ex post facto*. But the truth seems to be, that, upon the duties of the conjugal relation the law founds an implication of assent in the husband to the wife's purchase of necessaries, and a constructive promise to third persons to pay them for such necessaries found for the wife, who have a consequent right of action arising thereupon against the husband, and who, being considered by the law as having supplied such necessaries upon the presumption arising from the supposed relative situation of the married persons, are held entitled to express or constructive notice of circumstances altering the || ostensible legal predica- 337
ment of the married parties. *(m)*

(m) Cohabitation is so strong an evidence of assent, that it works like an estoppel against the husband to preclude him from denying his assent to her contracts for necessaries. If he turns her away or abandons her, he still continues liable, and his assent will still be presumed; for the presumption, unless there is a particular prohibition against trusting her, will flow constructively from his duty. It was even determined in Bolton v. Prentice, 2 Str. 1214. that if a husband turns away his wife without cause he will remain subject to her debts contracted for necessaries notwithstanding a particular prohibition. The reason of which resolution, as appears in the report, was, that the husband being a wrong doer had no right to prohibit any body; which was saying no more than the case implied. The case is at best a little anomalous and not very reconcileable with the principles laid down by the Chief Justices Hale and Holt. But the determination in Bolton v. Prentice appears to be brought a little more into consistency with the cases of Manby v. Scott, 1 Sid. 109. and Etherington v. Parrot, Lord Raym. 1006. if we support it on the ground that the strange inhumanity of the prohibition left room for supposing a returning sense of duty in the husband, which the law would intend rather than expose the wife to the danger of starving. If a wife goes away with an adulterer, the husband is discharged, whether the tradesmen have notice of it or not, 1 Str. 647. 706. 2 Str. 875. for though adultery *during cohabitation* does not, as it seems, unless the person suing can be proved to have had notice of it, discharge the husband from his liability. 1 Salk. 119. Norton v. Fazan, 1 Bos. and Pull. Rep. 226. by reason of the strong presumption above-mentioned; yet elopement and adultery together compose a case of great notoriety; and since, in such a case, the relative *duties* and *rights* of marriage are destroyed, (for the spiritual court would not assist to compel a restitution of conjugal rights, and the right of dower would be gone at common law,) there is no foundation for the implied promise to maintain her, but rather the contrary

A separation by agreement must be considered as the act of the husband, for the wife has no capacity to consent in law to such a proceeding; and as he is presumed not to have aban-
338 doned her to want, his ‖liability on the implied promise is not discharged. Where a maintenance is allowed, the husband is *virtually* discharged, according to *Todd* v. *Stoakes* above cited, during the *continuance* of it, (as the case must be understood,) if time has been given for the fact to be known; for such maintenance is a performance of an implied promise, and as such must affirm rather than discharge the husband's liability. But such separate maintenance being only evi-
339 dence to shew a performance of the ‖implied promise, as the *extent* of that promise in law is variable and relative according to the condition of the parties, it seems to follow that such allowance can only be a virtual discharge of it *pro tanto* according to the fluctuating standard of its relative sufficiency. And upon these principles, it seems clear that such variable measures cannot be fixed immutably by contract; for as the wife is not competent to charge, so neither can she discharge her husband by her deed. The law is paramount to these private agreements. Exclusively of her husband, a married woman cannot bind her own interest: so, on the other hand, the law has not placed the matrimonial engagements within the husband's control. And, having abdicated her separate legal powers, a married woman can never be admitted as a feme sole to prosecute or defend without her husband, while the conjugal relation lasts.

Such seems to have been the law with respect to the incapacities of a married woman, until shaken by the decisions
340 of the court of King's Bench, in the time ‖of the late Chief Justice. Since the determination of those cases which were cited by Lord Coke in his Commentary, (30) the abjuration, profession, and exile of the husband have been consid-

(30) Co. Litt. 132. b. 133. a.

may be inferred. 1 Salk. 119. 6 T. R. 604. But though the husband is not liable in such a case, it does not follow that the wife can be sued alone; and Blackstone J. seems to have thought that the debt of the wife, in such a case, could be recovered neither from the husband *nor* wife. 2 Bl. Rep. 1082.

ered as enabling the wife to sue and be sued, as a feme sole, her situation being considered as a sort of civil widowhood; but the resolutions of the King's Bench have added to these excepted cases, that of a married woman living apart from her husband upon a separate maintenance secured to her by deed, and have deduced this effect not from the sufficiency of the allowance as an evidence to repel the presumption of assent in the husband, but from the specific virtue of the contract itself. So, that the case of *Corbett* v. *Poelnitz* reminds us of the exclamation made by somebody on hearing the decision in *Lady Belknap's* case, (31) "*Ecce modo mirum fœmina fert breve regis non nominando virum conjunctum robore legis.*"

These observations are introduced with a due impression of respect for those judges who decided *Corbett* v. *Poelnitz*, the object of these sheets being only to bring to the view of the reader contrarient decisions, ‖and perhaps to assist him 341 in comparing the reasonings upon which they seem to have been founded. That respect, however, cannot prevent our seeing that subsequent cases have been cautious of extending the doctrine of *Corbett* v. *Poelnitz* beyond the sphere of its literal applicability; and, if the expression be not too bold, have circumroded its general reasoning till it has shrunk into an exception to that rule of law which it has endeavored to subvert. It cannot even be said, that the case of *Corbett* v. *Poelnitz* has *settled* the law within the range of its literal application, since the strong observations reported to have been made by a great judge in the case of *Clayton* v. *Adams*. (32)

On the ultimate decision *(n)* of this question as to the

(31) Vid. Co. Litt. 132. b.
(32) 6 T. R. 605.

(n) The writer has been informed, since the last proof sheet went to press, that the general question, as to the effect in law of a contract of separation and maintenance between husband and wife, is before the twelve judges, for their final decision. The case upon which it arose is Marshall v. Rutton. If the writer had had an earlier knowledge of this circumstance, reasons of respect towards the great tribunal whose judgment is to close the controversy, and a sense of his own insufficiency, would have rendered him more sparing in his remarks.

effect of such a contract between husband and ||wife, must depend, as it should seem, the propriety of those determinations which before and since the case *Corbett* v. *Poelnitz* have regarded the collateral covenant by trustees, parties to the deed of separation and maintenance, for the indemnification of the husband, as constituting the valuable consideration to support it against creditors and purchasers under the statutes of Elizabeth. If the husband and wife are good contracting parties to the effect of discharging the husband from his marital obligations, and qualifying the wife to act as feme sole, the intervention of trustees seems not to be necessary to perfect the consideration so as to answer the exigency of the statute of Eliz. It was, it is true, considered in the case of *Angier* v. *Angier* above cited, that the husband is discharged by the separate maintenance; and it appears that an *absolute* discharge, such as that contended for in *Corbett* v. *Poelnitz* was there adverted to, since, as that case is reported in *Gilbert*, (33) it was said in effect that the covenant for indemnification was of no material use except as a secu-
343 rity to the husband against such costs as ||he might be put to by suits for his wife's debts.*(o)* If such a doctrine be true, the covenant for indemnification sinks into some insignificance, and is surely not wanted for the support of the instrument; for if the husband be completely discharged by virtue of his deed of separation, the deed contains in its consequences its own sufficient consideration, and in every sense of the statutes of fraudulent conveyances, is good against creditors and purchasers. But except a case of *Hobbs* v. *Hull* mentioned by the Editor of the Treatise of Equity (34), where it was said that a court of Equity would sustain a conveyance by the husband of part of his estate as a separate maintenance for his wife, where there is sufficient ground for a sentence of alimony in the spiritual court, even against the claims of *creditors;* the cases both at Law and in Equity have holden such a covenant for securing the husband
344 necessary for the *support* of such settlements against || per-

(33) Gilb. Eq. Rep. 152.

(o) That the covenant for indemnity gives title to such costs, vid. 3 T. R. 374, Duffield v. Scott.

(34) B. ch. 2. sect. 6. note p.

sons claiming upon valuable consideration. And his Honor was of opinion in *Hyde* v. *Price* above referred to, that the husband was very wise in taking a covenant from trustees for his own indemnification; plainly intimating that, notwithstanding the case of *Corbett* v. *Poelnitz*, the husband was not by his deed of separate maintenance, unfettered, at law, from his legal liabilities.

The subject seems to have been viewed in this light by Lord Hardwicke in the case of *Fitzer* v. *Stephens* (35), which was thus in effect: Catharine Adair, being entitled under the will of Lord Rivers to an annuity of 50*l.* a year for her life, charged upon the testator's lands, married Fitzer in 1726, and in 1738 they agreed to part; and by a deed of separation the husband covenanted to allow her a separate maintenance of 14*l.* *per ann.* out of his own estate, and 24*l.* more to be paid to her quarterly out of the annuity of 50*l.* and 12*l.* *per ann.* to their daughter. The bill was brought by the wife and daughter against the husband, and against Stephens, a *creditor* of the husband, and to whom all || his estate, real and personal, had been assigned 345 pursuant to the directions of an insolvent debtor's act, to have the trusts of the deed performed. Lord Hardwicke, after having observed that, though the husband is bound by law to maintain his wife and children, yet that still the funds, out of which the maintenance was to arise, was liable to *creditors*; and having also remarked, that it had been insisted on the part of the plaintiffs, that the case disclosed a sufficient valuable consideration, though it had been admitted on all hands that natural affection alone was not one, but that he by no means allowed the consideration in that case to be a valuable consideration, for that if it were so, the husband and wife need only agree to put some part of his estate out of his power, by vesting it in trustees for her separate use, in order to defraud creditors, took notice, that, notwithstanding the deed, the wife might at any time disavow it, and take up goods according to her rank, since by the proviso it was stipulated that if the wife contracted debts, whereby the husband became chargeable, then || the deed should be void, 346 and there was no covenant on the part of the trustees to in-

(35) 2 Atk. 511.

demnify the husband, but the whole rested upon the proviso, that if the wife contracted debts, whereby the husband was chargeable, the deed should be void. There was, his Lordship observed, no covenant from the trustees or relations of the wife, that the husband should not be obliged to allow her a greater maintenance, or that the husband should be discharged from such maintenance. That the case was still stronger in regard to the daughter, for that she was an infant at the time the deed was executed; and that, besides, the father by nature was obliged to maintain her. That the case stood quite abstracted and naked from many cases, wherein there was a covenant by the relations of the wife to indemnify the husband against the debts of the wife; but that he would not determine what the construction even of *such* a deed would be with regard to a husband's *creditors*. His Lordship therefore decreed that, upon the plaintiff, Mrs. Fitzer's, paying the defendant Stephens the remainder of his debt, Ste-
347 phens || should release all his right to the annuity to the trustee of the deed of separate maintenance.

The doubt, however, in which his Lordship left the question, as to the validity of such a deed against *creditors*, where a covenant by a trustee for the wife to indemnify the husband against the wife's debts was included in it, has been answered and removed by a late case (35), decided in the court of Chancery, where Lord Kenyon, Master of the Rolls, sitting for the Chancellor, decided, that the covenant by the trustees in the second settlement to indemnify the husband against the debts which the wife might contract after the separation, was a valuable consideration; and that, therefore, the settlement, though made after the debt due to the plaintiff was contracted, was good against him. The same point was ruled by Lord Loughborough in the case of the *King* v. *Brewer*, Chelmsford assizes 1776, and may perhaps now be considered as at rest.

SECTION XIV.

348 || The provision which a widow, on the brink of a second marriage, makes for her children by her first husband, de-

(35) Stephens v. Olive et al. 2 Bro. C. R. 90.

serves the next place in this inquiry; and though the claim of a purchaser, for valuable consideration, stands on a different ground from the claim of a second husband, which latter rests his pretensions on no meritorious title, but on legal rights attempted to be fraudulently undermined, yet, as in the discussion of the husband's claims, courts of Equity have looked with great jealousy and discrimination into settlements anticipating upon the rights of husbands, a short view of the cases wherein exclusive reservations out of their property made by women with a general or particular prospect of marriage, either for their own separate benefit, or in behalf of children of a former marriage, have been sanctioned or superseded in courts of Equity as affecting the rights of husbands, may assist the inquiries of ‖ the reader. Such 349
an examination will exercise him on the general topics of distinction as to the comparative merits of these settlements under the different circumstances which accompany them. But he is not to suppose that the conjugal relation bears an analogy to the case of vendor and vendee, or that the husband is a purchaser by the marital rights of any thing more than the legal attributes of his chracter *(a)*. He must ‖ take his wife as 350

(a) Where a man makes a settlement upon his intended wife, he adds to his capacity of husband the character of purchaser, and becomes an object of particular favor in a court of Equity. As a *woman* marries in expectation of being maintained, she becomes in some measure a purchaser, by her *very marriage*, of an interest in such property of her husband, as he declares himself to be possessed of on the treaty of marriage, and in this light has been protected in Equity against clandestine agreements of the husband, with persons privy to the marriage, in fraud of her expectations. In Neville v. Wilkinson, 3 P. Wms. 74. edit. Coxe, Note, Ld. Thurlow relieved by injunction against a bond entered into by the plaintiff in equity to the defendant, before the plaintiff's treaty of marriage; the defendant having, by the plaintiff's desire upon the occasion of such treaty, misrepresented to the wife's father, the amount of the plaintiff's debts, and, particularly, concealed from him the bond in question; and it did not appear that there was any actual stipulation on the part of the wife's father as to the amount of plaintiff's debts. Vid. 3 P. Wms. 74. n. 1. This was an extension of the principle beyond the case of Roberts v. Roberts, 3 P. Wms. 65. edit. Coxe, wherein the wife was a purchaser by the express provisions of the settlement of an interest in the property, which was the subject of the husband's *private* agreement. The firm and liberal application of the legal maxim *ex dolo malo non oritur actio* has assimilated all these cases under the general principle of resistance made by all the courts to misrepre-

he finds her, without any authority derived from his marital character to overhaul her antecedent || acts, unless he can fix upon them the imputation of fraud as the ground of an equitable relief.

The cases are, perhaps, not irreconcileable, though they seem to lie in some confusion in the books of reports. *King* v. *Cotton* (1) is the leading resolution. L. C. having ten children by her deceased husband, before any treaty was in existence for a second marriage, settled some of her property upon herself during her widowhood, with remainder to her second son S. T. C. remained over, and covenanted with trustees to transfer stock, then standing in her name, in trust for herself during widowhood, and afterwards in trust for her second son; which stock was never transferred. The lady, afterwards, married K. her second husband, who brought his bill to have these settlements set
352 aside, as having been made without his privity, and || because he was induced to marry her by her apparent ownership and actual possession of the settled estates at the time of his paying his addresses.

The first point which was thought requisite to be established for the lady was the execution of these deeds of settlement before any negotiation for the second marriage had taken place; for it seemed to be an opinion of that time, that if, pending a treaty of marriage, a woman secretly put her property out of her future husband's power, the husband might set aside such settlement in a court of Equity, however reasonable in itself. But

sentations and clandestine agreements in derogation of open treaties and professions, on the faith of which third persons have been drawn into valuable concessions, or into acts affecting their property or persons. The reader may have abundant satisfaction on this copious head by pursuing it through the authorities learnedly collected by Mr. Coxe in his note to the case of Roberts v. Roberts, 3 P. Wms. 74. The point in Neville v. Wilkinson, wherein a third person having become accessary to the deception by joining in misrepresentations of the husband's property, was precluded from claiming against his own misrepresentations to the disappointment of the wife and her friends, the reader will find to be in perfect analogy of principle with the cases of Hobbs v. Norton, Vern. 136. and Barrett v. Wells, Prec. in Chan. 131. In Montefiori v. Montefiori, 1 Blackst. Rep. 363. the converse of the rule *ex dolo malo non oritur actio* was established, where it was said by Lord Mansfield that no man shall set up his own iniquity as a defence any more than as a cause of action.

(1) 2 P. Wms. 357. 674.

the want of direct notice did not, in that case, enable the husband, in the circumstances in which he stood, to impeach the settlement as fraudulent; for though the husband did not appear to have *notice*, every thing in the case tended to disprove *dissimulation* in the wife. The very notoriety and publicity of the transaction on her part, accounted for the omission of *actual* notice to the intended husband, of the existence of the settlement in question. ‖The meanness of the fortune of the 353
second husband, and his inability to make any settlement or jointure, whereby he might have purchased a claim in equity to a full and perfect disclosure of his intended wife's property, her exception of a large part of her fortune out of the voluntary settlement on her children, which fell under his dominion by the marriage, and the retention of her own jointure, which, by exhibiting the means of an affluent support without the settled property, repelled the presumption of any secret trusts, were judged sufficient to supply the omission of actual notice, and to negative the inference of fraud upon the marital rights. And, in that case, all presumption of fraud was said to be fully answered by the circumstances, that if the conveyance by Lady Cotton had been made to a *stranger*, as a *mere voluntary gift*, the husband could not have impeached it.

It seems clear, indeed, that if such a provision or ‖ gift can- 354
not be invalidated on the ground of fraud, there is no purchasing quality in the marital character which can raise the question of voluntary and valuable in these conveyances which are made by a woman, before, by reason of any treaty of marriage begun, the rights of the future husband can prospectively affect her acts. In the case of (2) *Bowes* v. *Strathmore*, the bare circumstance of want of notice in the husband was not allowed to be sufficient in itself to invalidate the reservation of exclusive property by a woman, as against a future husband. It seems to have been there held by the Judge, who sat for the Chancellor, that *deception*, and not mere *concealment* alone, was necessary to ground the relief of the husband, though circumstances might give to the non-disclosure of the truth the character of positive fraud. Thus, as it should seem, according to the reasoning of that case, a suf-

(2) 2 Bro. Ch. Rep. 345. 1 Ves. Jun. 22. et vid. the remark in 2 Ves. Jun. 194.

ficient settlement made by the husband upon the intended wife, entitled him to an explanation of her circumstances; and in such case an exclusive provision for herself, though not made in
355 prospect of the particular marriage, || would entitle the husband to relief in equity on the ground of fraud. And where no such settlement is made by the husband, yet such secret reservations by a woman for her own exclusive benefit, either pending an actual treaty, or in plain contemplation of a particular marriage, seem also to be considered by the case just referred to as unavailing against the husband.

It may with truth, perhaps, be said, that notwithstanding some professional discontent with the decision of *Bowes* v. *Strathmore*, it appears, from a view of the cases on the subject, that wherever such exclusive arrangements of property have been set aide in equity as against a husband either an actual *settlement* had been made upon the intended wife, or the case disclosed evidence of an *existing* treaty for or prospect of a *particular* marriage at the time of making them. Thus in *Lance* v. *Norman* (3) the recognizance there entered into by the intended wife to her brother, took place the day before the marriage. In *Howard et*
356 *ux.* v. *Hooker* (4) || the second husband had made a considerable settlement upon the wife under an erroneous impression as to the state of her property. In *Carleton et ux.* v. *the Earl of Dorset et al.* (5) the conveyance by the lady is stated to have been made without the privity of the person who afterwards became her husband; which word 'privity' cannot be understood in the sense merely of notice, which might be subsequent to the transaction to which it related, but must in its true signification refer to a time when the subsequent marriage was in contemplation. It would seem scarcely correct to say that an act was done without the *privity* of a person, if that person had apparently no interest in such act at the time when it was done.

In *Poulson* v. *Wellington* (6) where Lord King declared it as his clear opinion, that if the second husband had had no notice of the first deed made by the wife while she was a widow, that such deed would have been fraudulent and void in equity, as
357 against him, it || appears that a *settlement* had been made by the husband. And so strong is the equity of the husband

(3) 2 Ch. Rep. 41. (4) 2 Ch. Rep. 42. (5) 2 Vern. 17. (6) 2 P. Wms. 583.

which is raised by an actual settlement, that we perceive in *Poulson* v. *Wellington*, that, though the deed of the intended wife was made for the apparent purpose of securing a certain provision for the children of a first marriage, the reasonableness of the object was held not to repel the husband's claim, arising from the *purposed* concealment of a fact from his knowledge, which he had purchased by his settlement a right to know. A decision fortified by the legal maxim, that a fraudulent act shall never in any way inure to the benefit of those who claim under it. For although, where no *actual* deceit is proved, the provision for children may, in these cases, be evidence of honest intention, yet it seems clear that the innocency of the act itself, and not the *merits* of those claiming under it, is the true ground on which it must be supported against the marital claims of the second husband.

No presumption, indeed, of *original* fraud can attach ‖upon the mere neglect of notice, where a motive so rea- 358 sonable and just as a provision for a first family appears to explain these prospective settlements. But yet if, after such justifiable provision has been made, the intended husband is suffered, under an erroneous conception of facts, and under the impression of a false expectation founded on studied appearances, to make an ample settlement on his intended wife, he seems according to the case of *Howard* v. *Hooker* above cited, and the opinion of the court in *Poulson* v. *Wellington*, to be entitled to relief against the act of the wife, as being done in the spirit of dishonest dissimulation, and in palpable derogation of the marital rights. It seems, however, that, notwithstanding the existence of an actual treaty for a second marriage, such a settlement by a widow on the children of her first marriage cannot be impeached in equity, if no false appearances have been studiously held out to the intended husband, to induce him to make a settlement. This was the effect of the decision in *Hunt* v. *Mathews* (7,) where it was said by the court, that a widow might with good conscience, before she put herself ‖under 359 the power of a second husband, provide for the children which she had by the first.

So that upon the whole, if the result of these cases may be relied on as furnishing fixed criteria for future adjudications, we

(7) 1 Vern. 408.

seem to be warranted in holding, first, that where a single woman reserves by deed, before any treaty of marriage is in existence, an exclusive dominion over her own property, with a general view to her possible coverture, the husband, if he has made no settlement upon her, will not prevail in a court of equity to set aside such provision. Secondly, that by making a proper settlement, he has purchased a right to a disclosure, and a meritorious title to relief in equity, on the ground of fraud, inferrible from the want of notice under such circumstances. Thirdly, that, if the settlement by the woman, though in contemplation of a second marriage, and pending an actual treaty, be made for the support of her children by a prior marriage, the reasonableness of the end will legalize the means, and establish such a settle-
360 ment in equity against the claims of the second husband, ‖ notwithstanding the want of his privity and consent. But fourthly, if a settlement by the husband has been induced by a *purposed concealment* of such provision for the children of a former marriage, and by studied appearances contradicting the truth, the merits of the persons claiming the benefit of such provision shall not prevail to effectuate a deceit in derogation of the marital rights. The favour shewn in the case of *Hunt* v. *Matthews* to a settlement made by a widow, in prospect of a particular second marriage, upon her children by her former marriage, has by subsequent authority, been carried to the extent of supporting it against a purchaser for valuable consideration. And the *dictum* of the judge in *Bowes* v. *Strathmore*, by which a contrary doctrine is intimated, is opposed to the opinion of Lord Hardwicke in the case of *Newstead* v. *Searles*. (8) Perhaps, too, if the opinion which Lord Hardwicke is reported to have given in *Newstead* v. *Searles* is to prevail, we might suppose cases wherein those circumstances of dissimulation, which would invalidate
361 the sort of settlement we have been ‖ considering as against the rights of a second husband, would have no influence to the prejudice of the objects of such settlement in a contest with a valuable purchaser; for the *original consideration* of the settlement, abstracted from any question of fraudulent concealment, (by which, as it seems, a settlement proper in itself might be set

(8) 1 Atk. 265.

aside as against a second husband,) becomes the decisive point of litigation, where the settlement is impeached by a purchaser for valuable consideration. But if such a settlement made by a widow, in contemplation of a second marriage, for the support of her children by a first, as in *Hunt* v. *Matthews* was supported against a second husband, be good against a purchaser for valuable consideration, it is an instance of a relenting construction of the statute in behalf of a conveyance with a very *doubtful* tincture of valuable consideration, out of extraordinary regard to the peculiar exigencies of the object to be answered by it. The reasonings and positions of Lord Chancellor Hardwicke in the above cited case of *Newstead* v. *Searles*, certainly go to great length; but the case ‖ itself does not seem to have raised the 362 naked question as to the validity of a mere spontaneous provision by a widow on her second marriage upon the issue of the first; for this particular case, (which arose upon an application to the court by the issue of a first marriage, after the death of their grandmother, who had married a second husband, to obtain a specific performance of articles made in their favor on the treaty for the second marriage, to which end a bill had been filed against the surviving husband and a mortgagee who claimed under a fine levied to him by the second husband and his wife,) besides affording a plain ground for inferring notice to the mortgagee of the existing articles, turned, as his Lordship thought, upon *reciprocal* considerations on the part of the husband and wife, by reason of the provision under the articles for the children of the second marriage. It appears, however, upon a closer examination into particulars, that there wanted an authentic consideration of a *valuable* kind, in the case of *Newstead* v. *Searles*; for though the provision for the widow's first family, by being ‖ 363 blended with the limitations to the children of the second marriage, (which undoubtedly rested upon valuable consideration,) seemed in some sort to partake of the same valuable support, yet in truth, the second husband who was a contractor by his marriage for the limitations to the children of his own body, could not without great violence be considered as a purchaser for the children of the former husband: and it may seem a construction not much more reconcileable to sense, to regard the wife from whom the whole property moved, as a purchaser for her own children

out of property under her free disposal at the time. There is however a clear distinction between such settlements made, on a second marriage, upon children, by a first, where a *woman* is the settler, and those which the intended *husband* of a second wife may make for similar objects, as to the force of the consideration by which they may respectively be supposed to be induced. Thus in *Newstead* v. *Searles* above mentioned, where part of the property of the intended wife was freehold, and part leasehold,
364 and the limitations contained in the || articles made upon her second marriage, to the issue by her first marriage, involved a sacrifice by the second husband of his possible future right to a tenancy by the courtesy as to the freehold, and of his positive future power of alienation as to the chattel real, the wife in such contract might perhaps be said, with a little refinement of construction, to have purchased the provisions for her own children out of the anticipated rights of her second husband.

We must not forget too that in *Newstead* v. *Searles* the court did not compel an execution of the articles to the prejudice of *that* part of the claim of the mortgagee which was unaffected by notice, so that an equitable principle independent of the statute 27th Eliz. seems to have been at the bottom of the decision of that case; for as appears by the before cited case of *Evelyn* v. *Templar*, whether notice or not, cannot be a question even in a court of equity, where the simple operation of the statute is the ground of the determination, as it must be in those cases
365 where a legal || executed settlement and subsequent sale have attracted the application of the general law arising upon the statute. Upon the whole, though this case was a little strained in the use made of it in *Doe* v. *Routledge*, yet it must be admitted to afford a strong ground for considering these settlements by widows, made in contemplation of a second marriage, upon the children by a former marriage, as protected by their peculiar merit and palpable motives from the claims of a subsequent purchaser for valuable consideration. On the other hand it should be remembered that *Newstead* v. *Searles* was a *mixed* case, upon which the letter of the statute did not attach in law, and which allowed room for the influence of general equity; and at most, perhaps, when

clearly understood, it is an insulated case; (*b*) and, with due submission, very distinguishable from the cases of *Jones* v. *March* and *Roe* v. *Mitton*, with which the judgment in *Doe* v. *Routledge* has blended its principle.

(*b*) There is, however, in the Touchstone, p. 67. a case which is there called Miller and Pott's case, determined 19 Jac. Cor. B. which, though very obscure, and shortly stated, seems to turn upon a principle anologous to that of Newstead v. Searles.

CHAPTER IV.

SECTION I.

What has been said may serve to raise the reader's curiosity, perhaps to assist his industry, as to that part of the inquiry which regards voluntary and valuable settlements. The prospect becomes somewhat clearer as we turn our attention from settlements to simple conveyances made to strangers. The irregular impulse of compassion, where the provision for a wife or children has been in dispute, has created an unsteadiness of decision, by which consistency has been violated, and practice endangered. It has sometimes in these questions been forgotten, that the beauty of private tenderness is the deformity of a system, whose perfection is certainty; and that although pity is interwoven in the frame of the English law, yet that occasional compassion may be inconsistent with its general beneficence. In simple conveyances, || therefore, which less attract the influence of compassion, the judicial construction of these statutes has been pretty uniform. 367

Before we proceed further, it may be proper in this place to add some observations on the perfect consideration of value *(a)* and perfect integrity of dealing, necessary on the part of the purchaser. And first, it may be observed, that the valuable consideration need not be such a consideration, as is necessary to give effect to a bargain and sale. *Marriage* is a sufficient qualification to take advantage of the statute 27th Eliz. *(b)* Thus in a case (1) where A., after his marriage, and in the lifetime of his first wife, had settled the manors of Buttles and Payton Hall to

(a) See the comment in 2 Atk. 601. and 3 Rep. 83. on the distinct operation of the words *paid, given.*

(b) The words of the statute are "which have purchased or shall purchase for money or other *good* consideration."

(1) Douglass v. Ward, Chan. Cas. 99.

the use of himself for life; * remainder to his first and other sons in tail; and after the death of the first wife || without issue, had married B., a second wife, but before his second marriage, in consideration thereof, and of 1000*l.* portion, had agreed with the father of B. to settle upon her a jointure, and to secure it upon certain lands, (of which it appeared that the manor of Buttles was to be part), and died, leaving issue by B., his second wife, one son, the defendant, and also B. who soon after married C. the plaintiff, upon a bill brought against the defendant to compel him to settle the jointure on his mother, and to set aside the first settlement made by A. as fraudulent, though there was no proof that the portion was paid, and though it was insisted that there was no intention of fraud against the second wife, and that the first settlement was by fine, and so *notorious* and upon record, yet the court declared that the marriage was a good consideration to make the wife a purchaser, and decreed the settlement by A. to be set aside as fraudulent. It appears that the defendant brought a bill of review, and assigned for error, that it was not cognizable in equity, whether or not a|| 369 deed be fraudulent within the statutes of Eliz.; and besides that there was no color of fraud against the jointress, for the deed was made in the lifetime of the first wife, who lived ten years after, and the second wife, of course, was not then thought of; and moreover, that the settlement being by deed and fine, ought not to be presumed fraudulent without proof; but on demurrer to this bill of review, the decree was affirmed as to the above points. We may collect clearly from *Twine's* case (2,) that nothing less than a valuable consideration will avail to overthrow a precedent voluntary deed; nor is there any case to shew that even a *bona fide* conveyance to a trustee for payment of debts will have this effect. It appears indeed from several cases (3,) that where a man has made a voluntary settlement upon himself for life, with a limitation to trustees to support contingent remainders, remain-

(2) Rep. 81.

(3) See Basset v. Clapham, 1 P. Wms. 357 and Mr. Coxe's note.

* New. on Con. 391 to 409. 4 Desaus. Ch. R. 264. Granville Lib. 10, c. 8. 3 Co. 83. 2 Ves. 10. 5 Co. 60. 61. 2 Bro. C. C. 148. Jewett v. Palmer 7. J. C. R. 65. Lupton v. Cornell 4 Do. 262.

der to his first, &c. son in tail, remainder to himself in fee, and the settler has subsequently conveyed the lands to a trustee for the payment of his debts, the creditors have not relied upon the effect of this conveyance under the statute of Eliz. but have
370 carried their case into the court of || Chancery, to obtain a decree of that court to compel the trustees for preserving contingent remainders, to join in a sale to destroy the contingent remainders.

It may be as well again to impress upon the recollection of the reader, that except in the case above considered, of a settlement upon a subsequent marriage, the purchaser to take the benefit of this statute against a precedent voluntary conveyance or settlement must be a *bona fide* purchaser, not in *legal*, but in vulgar and common intendment; for where a parent advances his children, such children are in the language of courts, more particularly of the court of Chancery, denominated purchasers, and yet a mere voluntary conveyance to a perfect stranger, will stand as against such purchasers. Thus H. B. being seized of the manor of B. by indenture covenanted with L. D. for the advancement of such heirs male, as well those which he had begotten, as those which he should beget on the body of Mary, then his wife (sister of L. D.) to levy a fine of the said manor to the use of the said H. B. for life, and afterwards to the use of the eldest issue
371 || male of the bodies of the said H. B. and Mary begotten in tail, &c. and so to three issues of their bodies successively, remainder to the right heirs of the said H. B. and afterwards, and before the fine levied, made a lease of the said manor for a long term of years to R. H. and then levied the fine in pursuance of his covenant. The case being sent out of Chancery for the consideration of the Judges, it was resolved, that although the issue was a purchaser, he was not a purchaser in vulgar and common intendment. (4) The same rule holds with respect to a jointress (5) after marriage, who is incapable of averring fraud upon these statutes of Eliz.

In attending to the requisite qualifications of a purchaser within the statute 27 Eliz. the student must be cautioned against sup-

(4) 3 Rep. 83. b. 2. And. 233. Nedham and Beaumont's case.

(5) See the case related by Beamond, J. in Upton v. Basset, Cro. Eliz. 445.

posing that mere inadequacy of price is objection sufficient. (6) Where it has prevailed as an objection, it has generally been coupled with corroborating circumstances of evidence, (in which light *notice* may be of importance,) indicating contrivance and collusion between the seller and purchaser || to overturn 372 the precedent conveyance. It is not, however, necessary, that there should be ground to suspect contrivance between the seller and purchaser, as in *Doe* v. *Routledge;* for where there were circumstances tending forcibly to shew that the seller had been over-reached in the bargain, by an advantage taken of his notorious weakness and indiscretion, a former conveyance to trustees to hold in trust, and to manage for the seller *(c,)* was supported against the second conveyance, for which an inadequate price had || been given. (7) It has always been held 373 that gross inadequacy *(d)* amounting only to a colorable consideration is singly sufficient to negative the pretensions of a purchaser to the benefit of the statute.

It is not, however, only to the absolute and peremptory purchaser, that the protection of the act is extended. A mortgagee is a purchaser, against whom a former voluntary conveyance cannot be maintained; (8) although a mortgagee is only a pur-

(6) Finch. 104.

(c) Yet it was remarked by the Chief Justice, who related the case alluded to, that such a conveyance made on trust, would be void as to him who should purchase the land for valuable consideration *bona fide;* which is a strong instance of the severe sense into which the lawyers of that day construed the statute against voluntary conveyances; for what fraud, in the vulgar understanding of the word, could rationally be imputed to one who was proved to have confided his property to his friends, on account of his own mental infirmity, to manage for his benefit? And here we observe, that not merely the trust or beneficial interest of the vender would have been carried by the conveyance to the purchaser, but the legal estate, under the avoiding construction of the statute.

(7) Vid. 3 Rep. 83. b. the case related by Anderson, C. J.

(d) It has been said, that the reason why a court of Equity will not relieve against marriage contracts, though they are very unequal, is, because they cannot set the husband and wife in *statu quo*, and unmarry the parties. Vid. North v. Ansell, 2 P. Wms. 618. per Sir J. Jekyl.

(8) Skin. 423. Holt 477. 2 Vern. 272. and see the observation of Aston, J. in Doe v. Routledge, Cowp. 713. See also Chan. Ca. 220. and Amb. 289. per Lord Hardwicke.

chaser in equity to the extent of his security, for a voluntary conveyance is good to carry the equity of redemption, whether made before or after the mortgage. (9) But it seems a court
374 of equity will not open a foreclosure in favor ‖ of a subsequent voluntary alienee; *(e)* and it seems by the above cited cases of *Beverly* v. *Gatacre*, (10) and *Scott* v. *Bell*, that a surety to whom a lease of lands is made for his indemnification by the person for whom he is surety, is a purchaser within this statute; *(f)* but this is extremely doubtful. We may add to these observations respecting the requisites necessary to qualify a purchaser within this statute, that it has been determined that
375 the purchaser must contract for the ‖ identical thing which was the subject of the fraudulent conveyance, or he is not an object of protection. Thus, where J. C. (11) having a lease of certain lands for 60 years if he lived so long, forged a lease for 90 years absolutely; and afterwards by indenture reciting the forged lease, for valuable consideration, bargained and sold the forged lease *and all his interest in the land to* R. G. Lord Coke and all the other judges were of opinion, that R. G. was no purchaser within the statute 27 Eliz. for he did not contract

(9) Chan. Ca. 59. Rand v. Cartwright.

(*e*) Chan. Ca. 217. *et seq.* and vid. Thorne v. Newman. 3 Finch. 38. where the relief seems a little extraordinary, as allowing a fraudulent grantee under the statute, to redeem against a mortgagee, who had since the mortgage purchased the land.

(10) 2 Roll. Rep. 305. 2 Lev. 70.

(*f*) It is said, however, that a grant by one to a surety before he hath paid any money, is not good against the commissioners of bankrupt, by statute 1 Jac. c. 15. because not a valuable consideration within that statute; and see the case of Cartwright and Dent v. Underhill, Dyer 205. a in note. But see Broughton's case, 5 Rep. 24. In the case of Franklin v. Bradell, Hutt. 84. it was said, that a man's having been a surety for another, was a good *ex post facto* consideration to raise an assumpsit; see, however, the case of Legard v. Linley, Clayt. 38. where such a deed of indemnification to a surety was held fraudulent and void against specialty creditors in the court of chancery; and vid. 2 Roll. Abr. 783. adjudged between Ward v. Lumbard, that it is not a good consideration to raise the use upon a bargain and sale.

(11) Co. Litt. 3 b.

for the true and lawful interest, for that was not known to him, and if it had been known to him, perhaps he would not have dealt for it, and the visible and known term was forged. It was agreed, however, that the true interest did pass by force of the general words; but it was not included in the contract, nor did the valuable consideration extend to it.

Thus it seems to have been thought in this case, that the valuable consideration could only be extended to that particular interest, which it was in the contemplation of the purchaser to buy. If, however, there be, in truth, a valuable consideration given, it matters ‖not what *sort* of estate or interest 376 is the subject of the purchase. And it appears to have been resolved, upon this statute, that even where no actual estate or interest is contracted for, but only an acceleration of the right of possession, as where a lessee for years grants over his estate fraudulently, with intent to deceive purchasers; and afterwards the reversioner, not being conusant of it, bargains with the lessee for a surrender of the term, and gives a valuable consideration for it, and the lessee by parol or deed surrenders all his estate, the reversioner is aided by the statute 27 Eliz. although he does not purchase the land in fee-tail, nor for life or for years, according to the words of the statute, for he purchases no estate, but the *extinguishment* of an estate. And this point is said to have been decided the same year, in which the statute was made, and is cited in some old books from Justice Warburton's reports.

The case of a lessee or purchaser of a term of years is clearly enough embraced within the principle of the foregoing decisions. Accordingly in *Shaw* v. *Standish*, ‖(12) and 377 *Goodright* v. *Moses* (13) it was unanimously held, that a lessee at rack rent is a purchaser of his term for a valuable consideration within the statute 27 Eliz. and in the case of *Cross* v. *Faustenditch* (14) the same privilege was allowed to a lessee who had paid a fine, as the consideration of his lease; and in the same case it was said at the bar to have been resolved in 29 Eliz. in a case between *Hinde* v. *Collins*, that a fraudulent conveyance might be avoided as against a lease, whereupon rent is reserved without any other consideration.

(12) 2 Vern. 327. (13) 2 Black. 1019. (14) Cro. Jac. 181.

Much caution is necessary on this head of inquiry. It is a point of almost as much nicety to ascertain who shall be a proper purchaser, as what conveyance shall be fraudulent within this statute. In one place (15) we find it laid down that "he who makes a fraudulent gift within the statute, must be the same person that afterwards makes sale of the lands." But in *Burrell's* case, (16) it is stated as a point resolved by the judges that "it is not necessary that he who sells the land, should
378 make the former fraudulent estate; but if the ||estate be fraudulent *whoever* sells it, the purchaser shall avoid such fraudulent estate." A position, which if taken without some qualification, is a little too large in expression. But there is a case (17) in Vernon, which on a superficial glance might seem to lend some support to the observation first above adverted to; though that support vanishes upon closer inspection. That case was in effect thus—grandfather, father and son. The grandfather made a voluntary settlement upon his grandson and died. The father afterwards made a mortgage of the settled lands, and then the voluntary settlement was set up by the son against the father's mortgagee. The court held clearly, that the voluntary settlement should not be affected by the mortgage; but if the settlement had been made by the same person who mortgaged the land, it should not prevail against a purchaser. But here we must take notice, that the estate actually *passed* from the grandfather to the son by the voluntary settlement, for it was without doubt a good conveyance, until the mortgagee's title arose,
379 and as it passed to the son, nothing ||descended to the father, so that when he attempted to make this mortgage, he had in fact nothing to convey. He was heir at law, as was the seller in *Burrell's* case, with this difference, that the seller in *Burrell's* case had the inheritance *in* him at the time of the sale; whereas, here, the mortgagor, notwithstanding he was heir, was a mere stranger in interest at the time of the pretended mortgage. So that this case in Vernon does not warrant the extent of the position, that the person making the fraudulent conveyance, and selling the land, must necessarily be the same.

(15) Gilb. Uses 312. (16) 6 Rep. 726. b.

(17) 1 Vern. 45. Jones v. Purefoy.

In *Burrell's* case the grandfather made a fraudulent lease for a long term of years to the father. The father assigned over the lease to his son to prevent its being merged by the descent of the reversion; and both the lease and assignment contained peculiarities which were considered as strong indications of fraudulent intent.—After the death of the grandfather, the father sold the land to a purchaser for valuable consideration, ‖and 380 covenanted that the same was clear of all leases, &c. and it was determined that both the lease and assignment were void against the purchaser. This was the substance of the case. Now here we observe, that the fraudulent act, by which the purchaser was immediately deceived, was the assignment by the father; for if that assignment had not been made, the term would have been drowned in the inheritance. We see also that the father had the fee simple of the land at the time of his conveyance to the purchaser. But to give the statute its full beneficial operation, both the original lease and the assignment were adjudged fraudulent against the purchaser. With respect to the avoidance of the assignment, it was only the common case, for so far, the person making the fraudulent conveyance was the seller; but if the assignment only had been avoided, it might, perhaps, have been doubted, whether the effect of the statute rendered it so absolutely void to every intent as to let the reversion in upon the lease so as to operate a merger of it, though there seems good reason for saying, that, if it had been ‖necessary, the effect of the statute ought to have been so 381 construed in furtherance of its general object; *(g)* but the court gave the statute a more sweeping operation, and construed

(g) It seems always to have been the learned sense entertained of these statutes, that they render conveyances void to such purposes, vid. Hob. 166. and to such extent as may be necessary to accomplish their object. The construction adopted has been the *rei gerendæ aptior*. If a merger be *necessary*, in any instance, to their efficacious operation, as it might have been in Burrell's case, if the statute had been construed only to operate on the assignment, they must be taken, as it should seem, to cause an avoidance to the extent of effectuating the merger. On the other hand, in the case of Thorne v. Newman, 2 Chan. Rep. 37. where an estate of freehold under a voluntary deed was attempted to be set up in the person from whom the leasehold estate had been purchased, whereby it was contended that the chattel

both the lease and assignment as fraudulent within its purview; and as the result of that decision they laid down a rule of
382 construction, which ||imported, that, if the assignment by the father had been out of the case, and the original lease had been made by the grandfather to a stranger instead of the father, the sale by the father of the whole estate in the land, after the reversion had descended upon him, would have rendered the grandfather's lease a nullity as against such purchaser from the father.

It seems, therefore, that we are safe in saying, that it is unnecessary that the person who sells should be the same person who made the fraudulent conveyance, provided the seller has the estate in him to convey. But if A. makes a fraudulent conveyance within the statute, and then attempts a second time to convey the same land for the same estate *(h)* without a
383 valuable || consideration; and then the second grantee sells to a purchaser for valuable consideration, such purchaser is not a purchaser within the statute to avoid the first voluntary conveyance; for he to whom the second grant was made took no estate, and his sale being inefficacious as the act of a stranger, would fall within the principle of the case of *Jones* v. *Purefoy* above cited. Thus where A.

interest was merged, and so not in existence to pass by the assignment to the purchaser, such voluntary conveyance was declared to be void, both at law and in equity, against the purchaser of the lease, and the merger (if a merger it could be, vid. the case, and compare it with Platt v. Sleap, Cro. Jac. 275.) was consequently suspended.

(h) The words "for the same estate" are added in the text, because, where a man makes a fraudulent conveyance of a particular estate, and then conveys the reversion and inheritance to B. a third person, and B. sells to a purchaser, who gives a valuable consideration for the unincumbered immediate possession, since B. had an estate in him to convey, though not such as he undertook to convey, it may be doubted whether the purchaser should not hold discharged of the lease. And it may be questioned whether such a case can be distinguished in principle from Burrell's case above cited, where the father, after making such a lease, had suffered the land to descend to his eldest son, and the lease was adjudged void as against the purchaser of the entire inheritance from the eldest son. And see the case of Clerk v. Rutland, Lane 113.

(18) seised in fee of land bargained and sold it to B. and C. with power of revocation upon the tender of 20*s*. and before an effectual tender made, so as to revoke the first conveyance, covenanted to stand seised of the land to the use of P. his nephew, for his advancement in life, who, after the decease ‖ of 384 A. sold it to J. S. it was resolved by all the Judges, that the conveyance to P. could not make void the first conveyance, and the subsequent sale was regarded as dependent on that previous question.

To make the statute extend to avoid the fraudulent lease made by the grandfather in *Burrell's* case, it was necessary to found the rule of interpretation upon a strong presumption of law. For as the *grandfather* made the fraudulent conveyance, and the *father* sold to the purchaser, the father was not within the verbal import of the statute which speaks of fraudulent conveyances with intent to deceive purchasers; for how could the fraud of the grandfather be coupled with the act of the father? The identity of the agent is, in strictness, necessary to the accomplishment of what the statute regards as *one* act of fraud, nor can we separate in *idea* the intent from the act without destroying the very *essence* of fraud; but the grave and vigorous expositors of that law, labouring by artificial ‖ presumption to draw out 385 the efficacy of its general clauses to the utmost stretch of its purview, chose rather to hazard a solecism than to leave to fraud one hope of evasion. They resolved, therefore, that the person who actually purchased was the person intended to be deceived, and in their nervous idiom they declared that "for as much as it is intended and presumed in law, that every fraudulent lease is made to the intent generally to defraud purchasers, farmers, &c. within this generality every particular purchaser and farmer is included." * It should be observed also, that the court would not allow it to be a material question, whether the seller be consuant (*i*) or not of the former fraudulent lease.

(18) Dame Burgh's case, Moore 833.

(*i*) The case, as to this point, seems to have been misapprehended in the statement of it in Lane 113.

* Chamley v. Dunsany, 2 Sho. & Lef. 714.

In *Burrell's* case above cited we observe, that the person selling, though a different person from him who made the voluntary conveyance, yet was *in* by title in *privity* of estate, and the power of defeating a former fraudulent conveyance, seems to
386 bound itself || within this limit. Thus in the case of *Hunt* v. *Gately* (19,) where a person in remainder after an estate tail made a voluntary grant of rent, and then tenant in tail suffered a common recovery in favor of a purchaser for valuable consideration, it was contended that the grant was fraudulent and void as against the purchaser within the statute 27 Eliz. But this the Justices all denied; and were very clear in opinion that the voluntary grant ought, in that case, to have been made by him who made the sale. Though they were equally clear on other grounds that the rent was destroyed by the recovery. And a still stricter notion prevailed in the case of *Clerk* v. *Rutland* (20,) where a father made a lease to a stranger for forty years, and continued in possession, and afterwards conveyed the land to a younger son, who sold it for a valuable consideration, it was doubted whether the purchaser could avoid the lease; but it was said, that if in that case the father, after making such lease, had suffered the land to *descend* to his eldest son, then the purchaser from the eldest son should avoid the lease.

387 When this inquiry into the merits and qualifications of a purchaser to entitle him to the benefit of this law, brings us to the doubtful point at which voluntary and valuable considerations begin to divide, we must attend to the same distinctions as are necessary in considering the availableness or insufficiency of the first conveyance as against a subsequent purchaser. Though the precedent conveyance should be fraudulent under every clause of the statute, the statute only avoids it against a purchaser of a certain description; and though a purchaser be ever so fortified in his value and integrity, there is a certain degree to which the negative or positive indications of fraudulent intent must amount before the prior conveyance is annulled by the statute. The tendency, or if the expression will be allowed, the propensity of the law to uphold rather than destroy, though it may not enervate the

(19) Moore 158.

(20) Lane 113.

statute by mitigating its construction against conveyances or gifts without consideration where the subsequent purchase is clear from suspicion, || may yet reasonably induce a somewhat 388
more jealous inquiry into the merits of those who demand the destruction of subsisting titles. It is a distinction, however, to be cautiously admitted, and only, perhaps, where cases hang upon a nice balance of considerations. It is settled beyond doubt, that only a valuable consideration will support the pretensions of a person who attempts to found a title upon this statute in derogation of an antecedent settlement or conveyance. But it may be doubted whether that constructively valuable consideration which has in some cases singly prevailed, in others cumulatively tended to support precedent conveyances against subsequent purchasers, will arm the purchaser against a prior voluntary deed with power sufficient to overthrow it. That *ex post facto* sort of consideration which has had more or less weight in the cases of *Prodgers* v. *Langham* (21,) *Kirk* v. *Clark* (22,) *the East India Co.* v. *Clavel* (23,) and in *Doe v. Routledge*, could hardly it is conconceived, prevail in a court of law or equity as a foundation for the claim of a subsequent grantee against an existing voluntary title, for this || would be to infer the prospective fraud 389
within this statute with too much violence of technical construction.

It seems clear, upon principle, and agreeable to all the determinations of the court of Chancery, that a trustee, appointed under a voluntary settlement, cannot become a *bona fide* purchaser, so as to dissolve the connection between himself and his *cestui que* trusts; if he is trustee of the fee simple, he cannot, by paying a full value, destroy his character of trustee; neither as it clearly seems, can such trustee of a term only, by the purchase of the fee, extinguish his term in equity. And if a trustee, with the particular direction of his *cestui que* trust, make a voluntary conveyance, he cannot afterwards, without the direction of his *cestui que* trust, defeat such voluntary conveyance by his subsequent sale to a valuable purchaser without notice, (if the purchaser have notice he is implicated in the breach of trust, and so not a

(21) Sid. 133. (22) Prec. in Chan. 275. (23) Prec. in Chan. 377.

bona fide purchaser) || (*k*,) for the first conveyance did not originate in any movement of his own mind, or of the mind of any one under whom he claims; and as the latter conveyance supposes a plain breach of trust, it is not only disconnected with, but opposed in interest to the first conveyance. This was the case of *Shelden* v. *Hanbury* (24.) where A. a woman, living separate from her husband, had saved money, and purchased in B.'s name in trust. B. lying ill, made a lease *at the request of* A. for 200 years to C. on condition that C. should pay the profits to A. and also on condition that if B. survived the first day of June, and then paid 1*s*. to C. the lease should be void. B. survived the day, but did not pay the shilling. Afterwards B. in *consideration of* 100*l*. *made a lease to J. S.* with covenants for quiet enjoyment, &c. B. died. C. having notice given him now, and not before, of the lease which had been made to him, enters upon J. S. The question was, whether the lease made by B. at A.'s request, in part performance of the trust, were fraudulent and void by the stat. 27 Eliz. c. 4. against J. S. as puruhaser,
391 || or, defeated by the power of revocation reserved to B. who made the lease to C. and also the subsequent lease to J. S. And as to the question of intent it was said in answer to the fraud under the statute, that the *intent* was to perform the trust, and could not be to deceive a purchaser, because in good conscience it was to perform the trust for one who did not *direct* the second sale. And as to the second point the power to revoke was lapsed and gone. But it has been resolved, that a stranger, who makes a purchase, in his own name, with the money, and for the benefit of another for whom he is a trustee, is a purchaser within the statute 27 Eliz. (25)

In considering what persons are entitled to the benefit of the statute 27 Eliz. we must not omit to observe, that the statute extends its protection not only to subsequent purchasers of the land in fee simple, fee tail, and for life, lives, or years, in which clause mortgages are included, but also to such as have purchased

(*k*) This seems to have been the reason of the decree in Aldridge v. Duke et al. Fin. Rep. 439.

(24) Vin. Abr. tit. Fraud, vol. 13. 527. Trin. 2 Jac. and vid. Moore 757.

(25) Poulton v. Wiseman, Noy, 105.

any rent, profit, or commodity, in or out of the land; which words import an obvious intention in favor of all incumbrancers. That clause of the act, which has in view the frustration of conveyances, gifts, grants, limitations of uses, &c. made with powers of revocation, at the pleasure of the grantor, as against those afterwards coming in upon valuable consideration, expressly extends to all subsequent charges upon the land; for the words are, "shall or do bargain, sell, demise, grant, convey, or charge the same lands:" and charges *upon* as well as charges *out* of the land seem within their natural import. It is true, the conusee of a statute or recognizance has in strict legal language no charge upon the land; (26) he has neither a right *in* or a right *to* the land; and if he releases his right in or to the land, he may nevertheless extend it if he chuse. *(l)* But yet in common intendment statutes and recognizances are charges upon the land, and they have || been so called in courts of law. (27) And it would 393 have been too much to circumscribe the operation of a law for the prevention of frauds, by insisting on such technical formalities. Therefore on a *scire facias* (28.) to have execution of a recognizance, where the case was, that E. the defendant's father, made a feoffment to the use of himself for life, remainder to the defendant the son in tail, with divers remainders over, with power of revocation; and then for the consideration of 400*l.* entered into a recognizance to the plaintiff, and died; it was determined, that the land was extendible against the son. And it was said, that though the statute did not speak expressly of conusees, it should be expounded to extend to them, for the statute had always received an equitable construction to relieve purchasers.

The *magnitude* of the thing purchased is not respected by the statute: any profit or commodity in or out of the land are thereby guaranteed to the purchaser for valuable consideration

(26) Vide the case of Barrow v. Gray, Cro. El. 551.

(l) Plowd. 72. 10 Rep. 50. b. Cro. El. 552. and see the conclusions, branching out from this distinction, with respect to tacking incumbrances, in Brace v. the Dutchess of Marlborough, 2 P. Wms. 490.

(27) Vid. Hard. 173. per Baron Turner.

(28) Garth v. Ersfield, Bridgm. 22

against fraudulent conveyances. || Thus (29,) upon a plea of not guilty in trespass, the defendant gave in evidence articles, by which R. (under whom the plaintiff claimed as heir) sold to him some trees in such a wood, to be taken between such a time and such a time, and that he within the time took the trees; upon which the plaintiff proved that R. was only tenant in tail under a settlement; but as it came out, that this was only a *voluntary* settlement by R. himself, it was clearly held by Jones, C. J. that this sale, being proved to be for a *valuable* consideration, bound the heir as a case within the Act 27 Eliz.

SECTION II.

395 || In treating of simple conveyances under the statutes it may be proper to observe, that the succeeding cases and remarks will be introduced without regard to the distinction, which has been taken between the situation of creditors and purchasers under the statutes, of which they are respectively the object. The tenor of the adjudications on these statutes do not appear to warrant the difference as to the merit of these distinct claimants up to the extent to which it has been carried by loose observations at the bar, and particularly in *Shaw* v. *Standish*, (1) where it was said that "there is a difference between purchasers and creditors, for the statute 13 Eliz. makes not every voluntary conveyance, but only fraudulent conveyances, void against creditors; for that as to creditors it is not sufficient to say that the conveyance is voluntary, but it must be shewn that they were creditors at the time of the conveyance made, or by some other circumstance it must appear that the conveyance
396 made with intent to deceive ||or defraud a creditor;* but in

(29) Hatton v. Heale, 1683. Bull. Ni. Pr. 22 Vin. Abr. 21 tit. Voluntary conveyances D. 2.

(1) 2 Vern. 327.

* Jackson v. Seward, 5 Cow. 67; Wadsworth v. Havens, 3 Wend. 411; Waterhouse v. Benton, 5 Day, 136; Whelan v. Whelan, 3 Cow. 537;

case of a purchaser, *all* voluntary conveyances are void without more by the express provision of the statute.

It is true, that it appears by a majority of the decisions, some of which have been adverted to in a former part of this essay, that a family settlement *(a)* made *after* marriage by one not indebted at the time, is in general valid against subsequent creditors ; but in *general* (2) *only*, because, though the debts be upon *subsequent* contracts, yet if, as has before been shewn, the provisions be superfluous, unreasonable, or unaccommodated to the end proposed, or if any other suspicious badges characterize the transaction, such settlements, notwithstanding the meritorious claims of children, may be challenged by subsequent creditors. But except in this privileged case of family settlements and provisions, the courts both of Law and Equity seem to have treated conveyances *merely* voluntary as ‖invalid against creditors upon prior *and* subsequent con- 397 tracts. In the case of *Stiles* v. *the Attorney General*, which will be hereafter cited at some length, the claim of the bond creditor was *subsequent* to the grant,and yet he prevailed, although the grant was acknowledged by the court to be grounded on a just and equitable consideration. If we put out of our contemplation family settlements and provisions, (which as against creditors upon *subsequent* contracts, as has before been observed, are upon a foot with conveyances upon valuable considerations, unless accompanied with certain special indications of fraud,) it may be, perhaps, doubted how far it is strictly consonant to authorities to say, that *mere voluntary* conveyances to strangers are only *prima facie* evidence of fraud under the statutes to the effect of avoiding them against creditors and purchasers.

Upon an examination of the most indulgent cases, wherein

(*a*) Vid. Holcroft's case, Dyer 294. b. note. A man conveyed lands for the preferment of his *children*, and afterwards sold them *bona fide, it is good if he was not indebted at the time:* by the justices: otherwise it is of, &c.

(2) Vid. supra p. 27. et vid. Naylor v. Baldwin, 1 Chan. Rep. 69. where the debts appear to have been contracted subsequently to the settlement.

Wood v. Jackson, 8 Wend. 9; Osborn v. Moss, 7 J. R. 161; Marbury v. Brooks, 7 Wheat. 556, and Brooks v. Marbury, 11 Wheat. 78; Bean v. Smith et al., 2 Mason, 252.

the want of valuable consideration has been restricted in *expression* to such *prima facie* evidence, it yet appears to have
398 been considered as subject to be ‖repelled only by circumstances which disclose some ground of stipulation or contract. But by requiring this ground of stipulation or contract to resist the *prima facie* evidence of a total want of valuable consideration, these cases in effect affirm, that some ground of stipulation or contract may be consistent with a total want of valuable consideration, or in other words, that a deed may be voluntary, and yet disclose some ground of stipulation and contract, by which, though voluntary, it becomes valid and effectual against creditors and purchasers. Whatever opposes *prima facie* evidence must be compatible with the existence of the thing which raised the evidence, for if the circumstances produced in reply to the alleged voluntariness of a conveyance repel the *charge itself*, instead of the *effect* or *evidence* of it, the inquiry resolves itself into a question of fact, as to the want or existence of a valuable consideration. If the alleged voluntariness of a conveyance must of necessity be answered by the allegation of a matter which shews the conveyance to have been not voluntary, then it follows, that the voluntariness of a conveyance is conclusive, and not merely *prima facie* evidence of fraudulent
399 intent within the ‖statute under consideration. Those, therefore, who contend against the conclusiveness of the evidence of mere voluntary conveyances, admit too much by acknowledging, that the evidence of such voluntary conveyances can only be repelled by shewing some ingredient of contract or stipulation, unless they at the same time maintain, that such ingredient of contract or stipulation does not intrinsically amount to what, in the true and legal understanding of the expression, is meant by *valuable* consideration. Perhaps, this is a proposition which they will not *explicitly* maintain, and if they do, the dispute rests merely on a diversity in the construction of words.

To shew therefore that a mere voluntary conveyance is not conclusive, but merely *prima facie* evidence under the statutes, that proposition must be denied, which affirms that the alleged voluntariness of a conveyance is only to be answered by shewing some ground or ingredient differing *essentially* from a mere

gratuitous donation. It behoves the prudent reader to regard only the *substance* of the controversy; and after passing the point admitted, viz. that in respect ‖to family provisions, 400 where there is no *internal* inconsistency to raise a suspicion of fraud, the debts of the settler *subsequent* in date shall not prevail against them, to inquire whether an allegation of the total absence of consideration must of necessity be answered by proof of circumstances which give to the transaction an actual tincture of contract and stipulation. Where the meaning of terms of technical use is not uniform and certain, a proposition is better expressed in simple though circuitous language. Whatever may be the true technical import of the words *valuable* and *voluntary*, neither of which occur in the statutes we are considering, or belong to the dialect of the common law, can it be said that the cases have established it as a principle that a naked conveyance to a stranger without a single ground of stipulation or contract, however good, just, and laudable its ostensible motives may be, can sustain itself under these statutes against creditors and purchasers upon *fair pecuniary* considerations? It must be owned that the expressions of Lord Mansfield in *Doe* v. *Routledge* are rather large; but still the cases adduced by his lordship do not, as ‖it should seem, entirely come 401 up to the extent of those expressions; but make it appear that his lordship comprehended within the term *voluntary*, that sort of consideration which is expressly termed *valuable* in *other* cases. His lordship observed, that, "a father has a right to give his estate to *all* his children, *(b)* and therefore, may fairly say, that unless you consent to these limitations, I will not join." It seems very evident by his lordship's use of the word '*join*,' that he had in his mind those cases, upon which the opinion of Lord Hardwicke has before been produced, wherein the parent

(b) The contest in Doe v. Routlege was between a *purchaser* and the party claiming under the voluntary conveyance. The cases cited, which exhibited circumstances that would *clearly* have upheld the conveyances against the claims of creditors upon subsequent contracts, according to the distinction before adverted to, seemed also to have been strongly tinctured with *valuable* consideration; they cannot therefore be admitted to prove, in its full extent, his Lordship's position, that *voluntary* conveyances may be good against purchasers.

has such an interest in the land as ‖ that the son cannot make a proper settlement without his joining; as in the case of father, tenant for life, remainder to the son in tail, or in a case circumstanced like the case of *Roe* v. *Mitton* before cited; where the whole question turned upon the mother's joining in the settlement, which could not have been made, in the manner desired by the parties, without the mother's concurrence.

Enough, perhaps, has been said in a former part of this treatise to shew that the *relation* of the parties in both the cases just mentioned was such as to qualify them to stipulate and contract for the controverted limitations, and that it was looked upon by Lord Hardwicke and Ch. J. Wilmot as supplying to the transaction the support of a *valuable* consideration. The other case of a voluntary conveyance unimpeachable by creditors or purchasers, put by Lord Mansfield in the above mentioned case of *Doe* v. *Routledge*, which supposed a relation of a married woman, having her money in his hands, to say to the
403 husband "I will ‖not pay this money to you unless you make a proper settlement," falls obviously within the predicament of that class of cases which in the eleventh section of the preceding chapter, have been shown to have been grounded, according to the uniform opinion of the courts, on a *valuable* consideration. His Lordship's instance of *Newstead* v. *Searles*, was apparently the strongest to his purpose; to the discussion of which case at the close of the foregoing chapter the reader is referred.

Taking it for admitted, that all those cases which disclose a ground, however small, of stipulation and contract, are cases of *valuable* consideration, and that a voluntary conveyance is *at least prima facie* evidence of fraudulent intent, so as to throw the proof upon the person claiming under it; it may be in order next to examine whether any thing *short* of this ground of stipulation and contract is sufficient to answer the charge of voluntariness, and to satisfy the constructive exigency of the statutes under consideration. To the question why convey-
404 ances for which natural and ‖reasonable motives may with so much consistency and likelihood be alleged as to leave no suspicion of fraud in the fair judgment of mankind, and to afford that high degree of probability, which, in the general concerns of life, induces a moral reliance, an answer has been

attempted to be given in an early part of this essay, where the principles and rules adopted in the construction of the statutes of Eliz. by ancient authorities, were the subject of consideration. We may add to those remarks by way of general observation, that there is an excess of discrimination(*c*) in investigating the qualities of things which in legal, as well as other objects of critical disquisition, tends only to draw out a question to infinity. That the foundation of every rule *must* of necessity be imperfect, and that it is impossible to bound the scope of its application to a mathematical point; for rules are in the moral what classes ‖are in the natural world; the helps of human 405 weakness, which being unable to pursue the insensible gradation of individual existences, seizes upon points of visible contrast to make them serve for the denominations of its artificial divisions. That no degree of accuracy can frame an exact scale of considerations whereby to mark the degrees from voluntary to valuable; but convenience requires that the rule should begin at a notable and definitive point, though that be a point of some rigor, to avoid the perplexity of a double barrier and amphibolous constructions. That partial rigor is compensated by general certainty; and where acts are of doubtful complexion, it seems best to construe them *within* the prohibition of a rule designed for the prevention of fraudulent pretences. That all those ostensible motives for a conveyance, which though they import the contrary to fraud in themselves, may be easily assumed as a color and protection to fraudulent transactions, *are* of this doubtful complexion; for there is hardly any disposition of property for which reasons of propriety, prudence, or honor, satisfactory ‖enough to those who are not interested in 406 disputing its validity, may not be given: but the law is afraid of being intrapped by the ambiguity of these pretensions, and calls upon the parties to come forth *tanquam in arena.* That in some cases these reasons are more imperative than in others, and that they are *most* of them satisfactory to all general purposes of moral inference. But that the approximating shades from doubt to suspicion are almost imperceptible, and if admitted

(*c*) See an observation to this effect by the Master of the Rolls in Atkinson v. Turner, 2 Atk. 41.; and again in the next case by the same Judge, 2 Atk. 42.

to govern the application of these statutes, would involve the interpretation of them in those ambiguities and subtleties, which it was their object to meet and traverse by the breadth and certainty of their provisions.

Perhaps the judgment of Lord Hardwicke, in the case of *Stiles* v. *the Attorney General*, (31) was moved by considerations of this sort; which case, as it cannot be compressed without the omission of some point important to this question, is here given at some length. The Duke of Wharton on the 24th of March, 1719, by deed-poll under his hand and seal, considering
407 that ‖the public good is advanced by the encouragement of learning and the polite arts, and being pleased therein with the attempts of Dr. Young, in consideration thereof, and of the love he bore him, did give and grant unto the said Dr. Young an annuity of an £100 to hold during his life, out of all and every his manors, messuages, lands, tenements, and hereditaments, to be paid to him or his assigns half yearly or quarterly, with a clause of distress in case of non-payment. By an indenture dated the 10th of July, 1722, made between the said Philip Duke of Wharton of the one part, and Dr. Young on the other part, reciting the above deed-poll; and also reciting that the said Duke, was indebted to Dr. Young on the said annuity in £250 and also in £100 more, making £350; and also reciting that the said Dr. Young had at the said Duke's special interest and request quitted the service he was in, in the Earl of Exeter's family, and thereby lost an annuity of £100; and also reciting that the said Duke being willing to make the said Dr. Young some amends for
408 his said loss in quitting the ‖Earl of Exeter's family, had proposed to give him a farther annuity of £100 to be paid quarterly in lieu of the said £350 and for his loss in quitting the Earl of Exeter's family, it is witnessed, that in consideration, &c. the Duke did give, grant, bargain, and sell to Dr. Young one other annuity, of 100*l.* besides the said annuity granted by the above-mentioned deed-poll, to hold to the said Dr. Young during his life clear of incumbrances; and the said Duke did thereby charge all his manors, &c. with the said two annuities of £100 each. By a deed dated the 12th of July, the Duke charged the lands in trust to

(31) 2 Atk. 152.

Mr. Justice Denton, &c. with the £200 annuity to Dr. Young. Upon a bill brought by the Duke's judgment creditors in H. T. 1722, there was a decree for a sale of the trust estates, directing the money arising therefrom to be paid to creditors, according to their priorities, and the residue to the Duke.

Dr. Young in his examination on the 4th February 1730, before the Master, set forth at large the considerations of the annuities; and likewise that the Duke ‖of Wharton had 409 given him a bond dated the 15th of March, 1721, in the penalty of £1200 conditioned for the payment of £600 in consideration of his having taken several journeys, and incurred great expenses in order to be chosen a member of the House of Commons at the desire of the said Duke, and in consideration of his giving up two livings of £200 and £400 per annum, value, in the gift of All Soul's College, on the promises made to him by the Duke of serving and advancing him in the world.

On the 26th of April, 1740, the bond creditors of the deceased Duke brought their bill, setting forth the decree in the former case; and insisted that all the judgment and other creditors provided for by the said decree had been paid, and that there remained sufficient in the hands of the trustees to pay the bond debts, and that the claim of Dr. Young was to be considered as an annuity or *present* only, and ought to be postponed to their demands. The Master, on the 16th December made a report of Dr. Young's demands, and stated the several facts before mentioned, relating to ‖the said an- 410 nuities and bonds; and said, that he did not find any pecuniary consideration either for the bonds or the annuities, and that several of the creditors of the late Duke, for money really lent him, were still unpaid, and therefore whether the said demands of Dr. Young, amounting to £365 should take place of any of the said debts, *subsequent in time, (d)* which were for a consideration in money, he submitted to the judgment of the court.

(d) The remark in Bull. N. P. 257. may be understood, perhaps, to advert only to settlements and advancements; for whether the debts be subsequent or antecedent, is a question which will not affect the construction in the case of conveyances to strangers, as, possibly, appears from what has before been said and cited on that point in a former part of this essay.

As to the first annuity his Lordship was of opinion, that the advancement of the public good, by the encouragement of learning and the polite arts, was not a legal, but a moral consideration, for though it might be a very *good* inducement, yet that it would not amount to a valuable consideration in the eye of the
411 law. But his Lordship thought that the refusal by Dr. ‖ Young of the annuity (*e*) of 100*l.* which had been offered to him for his life, provided he would continue as a tutor to Lord Burleigh, upon the pressing solicitations of the Duke of Wharton, and the assurances he gave him of providing for him, in a much more ample manner, (if that were the truth of the fact, and it was
412 ‖ no where contradicted), did certainly amount to a valuable consideration; for the valuable consideration would equally arise where a person gave up a *certain* pecuniary advantage at the time of the grant, as where a sum of money was actually paid down at a time. And, continued his Lordship, though the first annuity might be voluntary, taken singly, yet that the recital in the second would alter the nature of it, and turn it into a valuable consideration, for as there were arrears on the first, it was without doubt a just and lawful debt, and the promise not to sue for those arrears, was a good consideration, and from that time the first annuity ceased to be a voluntary grant. But his Lordship was clear as to the bond, which was recited to be given in consideration of Dr. Young's having been at a very great expense,

(*e*) Vide Lady Mary Herbert v. Earl Powis, 6 Bro. P. C. 102, where Lady Mary's declining the place of Dame d'honeur to the Queen of France, (which she had solicited), upon the Earl's promise to pay the annuity, seems to have been ranked among valuable considerations in a court of Equity, so as to raise a just debt there, as between the parties; and undoubtedly it would have been sufficient at law to raise an assumpsit. But it appears, that where such a consideration only supports an agreement, a court of Equity, when called upon to compel a specific performance of such agreement, will refuse its assistance to the prejudice of creditors, upon actual pecuniary considerations. This the attentive reader will collect from the cases of Lady Mary Herbert v. Earl Powis, 6 Bro. P. C. 102. and Jameson v. Skipwith, 1 Bro. C. R. 34. He may collect also from these and other cases, before cited, that such a consideration as that above adverted to in the case of Lady Mary Herbert v. Earl Powis, though substantiated in proof, would not support an actual grant or conveyance, as upon valuable consideration within the principle or policy of the statutes of Elizabeth.

when he was a candidate for a seat in parliament, that it was not supported by any valuable consideration, for Dr. Young could not be supposed to be a candidate for a seat in the House of Commons, with any other view but that of serving his country.

|| In the case of *Jameson* v. *Skipwith* (31), where a bill 413
filed by a tutor against his pupil's executors for an annuity for his own life was dismissed, we are to look for the reason of the decree in the uncertainty of the claim, which rested on the general words of the testator's will, whereby he charged his estate with all his debts, by bond, mortgage, or simple contract, and on letters written by the testator before making the said will, referring to an annuity, but without any specific length of time named. As the claim was set up only against the representatives of the party, a strictly *valuable* consideration was not necessary to its support, but it wanted the substance of a real engagement, and the form of an actual stipulation to induce the interposition of a court of equity. We find however in this case, in the reasonings of the counsel and the court, a decisive cognition of the Chancellor's distinctions in the above case of *Stiles* v. *the Attorney General,* and an implicit admission that an annuity granted upon the good and just consideration of instruction and tutelary care, is only availing as between the parties and || their re- 414
presentatives, but not against those, whose valuable considerations as creditors or purchasers, entitle them to the protection of the statute of Elizabeth against fraudulent conveyances.

Peat v. *Powell* (32) was a case upon the bankrupt laws, under which a conveyance without valuable consideration was *clearly void* by the *letter* of the statute: it may serve, however, to show the sense of the courts as to the circumstances constitutive of valuable consideration when creditors are opposed. A testator by his will taking notice that he had laid out great sums in the education of his eldest son John, in consideration thereof directed his said son John to relinquish all his right in the leasehold estate to his the testator's younger son Giles, to whom he gave the said leasehold estate; and then he devised all the rest residue and remainder of his real and personal estates, in trust for his said younger son, till he attained twenty-one, and then the trust was to cease. Giles attained twenty-one in the testa-

(31) 1 Bro. C. R. 34. (32) Ambl. 387.

tor's life-time; after the testator's || death John claimed the freehold estate as heir at law of the testator, insisting that the will was void, and threatening to commence a suit at law unless Giles would convey the estate to him: to avoid which, at the recommendation of his mother, Giles, by indenture dated 30th August, 1747, released and conveyed his right to the freehold estate to his brother John, who covenanted to pay half an annuity charged upon the estate to their mother. At the time of executing the release Giles was indebted to G. T. in 500*l.* upon bond, and on the 23d of December, 1756, became a bankrupt. The assignees brought their bill, to have the estate conveyed, and to have the deeds delivered up to them. And the Lord Chancellor said, that it was not like the case where conveyances are made
416 to quiet family differences, (*f*) in which case the court || would not require strict equality of consideration; but that there no reasonable equivalent was given by John.

Partridge v. *Gopp*, (33) determined by Lord Northington, was a strong case to the same effect. There a testator by his will gave £6000 to trustees upon trust to pay the interest to S. C. for her life, for her separate use, and afterwards to pay the same among her children. S. C. brought her bill against the testator's widow and J. S. the executors praying to have the £6000 secured. An account was directed to be taken of the personal estate in 1736. In 1745, J. S. the executor was, by an order of the court, committed to the Fleet prison, for non-payment into the Bank of the sum of £3000 part of the estate of the testator in his hands, where he remained till his death in 1750; and the cause was revived against Gopp and Edwards the defendants, whom J. S. had made his executors. On the 4th April 1753, the Master reported a considerable balance due from the estate of J. S. to that of the
417 testator; and it having been discovered that J. S. had ‖ advanced to his children divers sums of money, and the estate

(*f*) It appears that the settlement of disputed boundaries, and in general the object of removing contention, and compromising adverse claims, constitute a *good* consideration to support suits in equity for the specific performance of agreements. Vide 1 Ves. 450. But it seems clear that such considerations will not be good against persons coming in upon *valuable* consideration.

(33) Ambl. 596.

of the testator proving insufficient to pay the legacies, and J. S. having died insolvent, a supplemental bill was filed against Gopp, who had married one of the daughters of J. S. since deceased: Elizabeth Edwards, widow, another of the daughters, who had married Henry Edwards deceased; and against Sarah and Catharine, daughters also of J. S. for a discovery of the money so advanced, and to have the same refunded. Gopp, by his answer, admitted, that J. S. had given him, 1744, on the day of marriage, £500 as a portion with his wife, which he said was in pursuance of an agreement before marriage. The other married daughter of J. S. made the same defence. Sarah and Catharine confessed that in 1743, J. S. had made them each a free gift of £500 for their maintenance and subsistence in the world. And they all denied knowledge of the bad circumstances of J. S. at the time he advanced the money. It was insisted for the plaintiffs that these were fraudulent gifts within the statute 13 || Eliz. c. 5.—For the defendants it was argued, that they 418 were not fraudulent, because there was no secret trust, and they might be considered as payments of debts of nature. As to the married parties, the Chancellor said, there was a good consideration, and dismissed the bill as to them. With respect to the other children, his Lordship observed, that it had struck him at first as a hardship to make the children refund; especially as such a gift could not be considered as a *trust* for the giver. ***But on consideration he thought that no man has such a power over his own property, as that he can dispose of it so as to defeat his creditors, unless for consideration.*** That it is the motive of the giver, not the knowledge of the acceptor that is to weigh. That the statute extends to all cases, except where there is good consideration and *bona fides:* and that blood has been held not to be a good consideration. That he had no doubt but that the voluntary gift proceeded from affection getting the better of justice. And lastly, that it was done secretly and ***pendente lite.***

The reporter in a note to the above case adds, that || Mr. 419 Wilbraham thought that his Lordship laid down the position too largely, and therefore asked him in court for the information of the bar, whether he did not mean to confine it to the circumstances of *that case?* for that otherwise a parent could not make

any provision, of ever so small a value, to his child, without its being liable to be taken away in favor of creditors. To which his Lordship said, that the fraudulent intent is to be collected from the magnitude and value of the gift.

This case gives occasion for a few observations. According to the report of it, Lord Northington thought himself called upon by the statute 13th Eliz. to decree a gift or conveyance fraudulent against creditors, merely from the circumstance of its being *voluntary*, nor was any issue directed to take the sense of a jury on the question of *fraudulent* intent. In the case above cited, of *Stiles* v. the *Attorney General*, there were no extraneous marks of fraud: on the contrary, it was expressly declared by the court to exhibit a just and moral consideration; and though in
420 the case, just produced, ‖of *Partridge* v. *Gopp*, the voluntary conveyance was made *pendente lite*, yet the Chancellor chose to rest his decision on the broad proposition that "*no man has such a power over his own property as to be able to dispose of it, so as to defeat his creditors, unless for consideration*," rather than upon any symptomatic circumstances of fraud in the transaction.

The *subject* of the relief in the last cited case of *Partridge* v. *Gopp* points it out for particular observation. A distinction was taken by the counsel for the defendants between gifts of personal estate, and conveyances of real estate. As to the former of which, it was contended, that the statute would never construe them to be made with intent to defraud creditors, *unless there was a secret trust for the donor.* Real estate, it was said, remains and cannot be consumed like mere personal chattel: money might be spent and gone: and therefore, they apprehended, that the gift's being *voluntary* is sufficient evidence of fraud as to land,
421 but ‖not as to money. The Chancellor was somewhat struck with the distinction at first, and seemed to doubt how far money could be brought back by force of the statute, after actual possession had been given; but he was ultimately of opinion, that the distinction taken at the bar was ill founded, and that the quality of the thing given, ought not to cripple the beneficial operation of the statute, with respect to fraudulent gifts.

It must be owned, however, though the distinction made at the bar, in the above case, between real and personal estate, can nev-

er be admitted to the extent of including among those kinds of property which are beyond the reach of the statute all descriptions of personal estate, yet that there is an extreme difficulty in applying the provisions of the statute to property existing in the shape of money. It is true that, although money, in the langunge of the courts, is said to have no *ear-mark*, the court of chancery has, in some cases, where an executor has laid out his testator's money in || land, pursued the property in favor of a le- 422
gatee, notwithstanding the change in the substance of the thing; (34) but this it can only do through the medium of a constructive trust, which renders the justice of that court, sometimes independent of the legal qualities and changes of property. And where an executor had invested his testator's money in the purchase of stock; (35) this was determined to be no appropriation or conversion of the testator's estate, so as to prevent a court of Equity from following it, as much as if it had remained in the condition it was in at the testator's death. But if an executor gives away the assets of his testator, among his own family, a court of Equity, independently of this statute, cannot follow the money in the hands of the voluntary donees, so as to compel them to refund; but the remedy is against the executor, either for an account in equity, or for a devastavit at law. The statute 13th Eliz. does not enlarge the natural jurisdiction of any court, by furnishing any new remedies. It merely avoids the voluntary act, leaving the rest to the consequences and remedies || of 423
law. Where lands or chattels are voluntarily and fraudulently transferred, the statute 13th Eliz. avoids the transfer as against creditors, who have a right to regard the property as unaltered, and consequently still subject to their executions; but the statute helps them no further than by allowing them to avail themselves of this construction by the judicial remedies which flow from their rights. So that if the court of Chancery could not, in a case circumstanced like that above cited from Ambler, where no fraud was imputable to the *donees*, compel them to refund independently of the statute 13 Eliz., it is difficult to say

(34) See the cases of Lane v. Dighton, Ambl. 409. Ryal v. Ryal, Ambl. 413. Balgney v. Hamilton, Ambl. 414.

(35) Waite v. Whorewood, 2 Atk. 159.

what virtue was derived to the decree in that case from the authority of the statute.

To the remedy at law, under this statute, there is a *natural boundary* affixed, where the voluntary gift is of money, or other flux or consumable chattel; for the creditor must wait till he has prosecuted his suit to execution before he is ripe for litigation upon the statute in question, and if the individual property is, in
424 the mean time, gone or consumed, he cannot challenge ‖by force of the statute, unless by fresh action upon its penal clause, a right to damages or recompense in value. And it does not seem that equity will specifically follow, what is not the subject of a legal execution. So that money, which is of no intrinsic estimation, but merely the measure or medium of value, does not appear to be naturally embraced within the provisions of the statute 13 Eliz.; with respect to which statute it is not easy to admit that the bounds of its operation can be extended in courts of equity. We find it stated therefore, in Viner tit. *Fraud*, F. pl. 27. that, where a man, being much indebted, gave £600 for the benefit of his younger children six hours before his death, such gift was not fraudulent as against creditors, though it would have been so, if *real estate* or *chattel real* had been conveyed: a position, perhaps, a little too short, since there certainly are many articles of property not coming within the description of *chattel real* of which such gift or assignment would be fraudulent as against creditors. It seems, also to have been the opinion
425 in the case of *Fletcher* ‖ *et al.* v. *Sidley et al* (36,) that such gift of *money* would not fall within the provisions of the statute 13 Eliz.

But to return to the question as to what *degree of inducement* will form a consideration sufficient to support a conveyance to a stranger, as against creditors and purchasers within the statutes.

In the argument of *Twine's* case, Anderson, Chief Justice of the Common Pleas, put a case to this effect. (37) A man of weak understanding and incapable of managing an estate, which had descended to him, and being given to riot and disorder, by the mediation of friends *openly* conveyed his lands to them upon

(36) Eq. Ca. Abr. 149. 2 Vern. 490.

(37) 1 Rep. 836.

trust to take the profits, and apply them to his maintenance, in order to prevent his wasting and consuming the same; and afterwards being seduced by designing and deceitful persons, bargained and sold to them his lands, which were of *great* value for a *small* sum of money.* This bargain, although it was for *money*, was || holden to be out of the statute, for that Act 426 does not hold any purchaser who does not come to the land for a good consideration, lawfully and without fraud or deceit; but such conveyance, observed the Chief Justice, made on trust, *is void as to him who purchases the land for a valuable consideration, bona fide, without deceit or cunning.* The ground upon which that case was decided evidently involved an admission, that if the purchaser had come in upon valuable consideration, and *bona fide*, his claim would have prevailed against the antecedent conveyance, and this negative inference arising from the case was confirmed by the positive statement of the Lord Chief Justice himself, who related it, and who seemed to speak the sense of the othes Judges of his time. It appears, therefore, that the presumption of fraud raised by the statute from the want of val-

*According to the most ancient authorities, a person *non compos mentis*, may avoid his deed or feoffment. Year Book, 9 Hen. 6, 6; Britton, tit. *Dette*, f. 66; F. N. B. 66. It was afterwards held that no person should be allowed to stultify himself. Litt. s. 405, 6; Bro. Ab. Dum. fuit, pl. 3; 1 Inst. 274 a, Beverley's case, 4 Rep. 126; Stroud v. Marshall, Cro. El. 398; Cross v. Adams, Do. 622. This doctrine seems now to be repudiated. And it seems at the present day that the *bond* or other specialty of an *idiot* or insane person is not binding upon him. Yatesv. Boen, Stra. 1104; 2 Bla. C. 291; 1 Fonb. Tr. Eq. 5th ed. 48, n; Faulder v. Silk, 3 Camp. 126; 2. M. & P. 264; 5 Bing. 176. 5. c. See also, Mitchell v. Kingman, 5 Pick. 431; Webster v. Woodford, 3 Day, 90; Grant v. Thompson, 4 Conn. 203; Lang v. Whiddon, 2 N. H. R. 435; Seaver v. Phelps, 11 Pick. 304; McReight v. Aiken, 1 Rice, 56; 1 Bland. 376; No. 41, Amer. Jurist, 3; Rutherford v. Ruff, 4 Desaus, 350; Burch v. Hurst, 3; Do. 273.

If a contract entered into when the obligor is in a state of intoxication, so as to deprive him of the exercise of his understanding is voidable; and the party may for that cause avoid it though his intoxication was voluntary. Barrett v. Buxton, 2 Aik. R. (Vt.) 157; Per Walworth, Chancellor; 1 Paige, 580; Reynolds v. Waller, 1 Wash. 164; Wigglesworth v. Steers, 1 Hen. & Munf. 70; White v. Cox, 3 Hayw. 82; Seymour v. Delancy, 3 Cow. 445; Reinicker v. Smith, 2 Har. & Johns. 421; Duncan v. M'Callough, 4 Serg. & R. 484; King v. Bryant, 2 Hayw. 394; Burroughs v. Richman, 1 Green. 233.

uable consideration, was esteemed to be so strong as to dispense with proof of actual and visible fraud in the voluntary conveyor. For surely the special circumstances of the foregoing case, so far from being indicative of fraudulent intent, were strong on
427 the side of || a contrary inference. But the preventive policy of the statute was thought to demand this sacrifice to the salutary *certainty* of rules and the perfection of its *general* object.

It may be observed, that had the purchaser been without the imputation of fraud, he would have taken the legal estate, and not the trust interest, out of the *cestui que* trust, for the whole previous transaction would have been radically overthrown by the subsequent conveyance, and *this* upon the strength of the imputed fraudulency of intent within the statute. For the statute will not listen to a particular story of intellectual incapacity, against the strong presumption furnished from the two inconsistent conveyances. It is impossible to say what degree of capacity is competent to the conception of fraud, and it seems that the statute would be thrown into great difficulty of execution, if its efficacy could be stopped by so ambiguous a plea. Nevertheless the circumstances of such a case must always cast a suspicion on the character of the purchaser, so as to exclude him upon very
428 slight additional || grounds, from the protection of this law.

In the case of seduction, where the seducer, by way of making such reparation for the injury done by him as was in his power, has entered into a bond for the payment of a sum of money; though, in so doing, he has been considered as fulfilling the dictates of his conscience, and such consideration has been particularly respected both in courts of equity and law, yet it has been distinctly held, that this is not a *valuable* consideration, and therefore not good against creditors. (*g*) And we may deduce

(*g*) Vide the case of Turner v. Vaughan, 2 Wills. 339. and what is said in the same case by Clive J. in respect to a determination of Sir Joseph Jekyll. See also Lady Coxe's case, 3 P. Wms. 339.* Mr. Sergeant Williams has referred to all the cases on this subject of the premium *pudicitiæ* in his note to the case of Cray v. Rooke, Cas. Temp. Talb. 153.

*A bond given to a woman in consideration of past cohabitation, is good in law, although in a court of equity it would be postponed to creditors.

Sir Joseph Jekyll, Master of the Rolls, in a case where creditors interfered against a bond of this sort, wished he could have given the lady the money upon the bond; and when it is *præmium pudoris* a court of equity will not relieve against such a bond; per Clive, Justice, in Turner v. Vaughan above cited in note.

as a consequence from this position, that a *conveyance* resting upon such a consideration would be void within the statute 27 Eliz. against subsequent purchasers for pecuniary consideration.

|| With respect to conveyances or assignments for *payment of debts* some distinctions seem proper to be taken. 429

And first, it may be remarked, that a general conveyance or assignment to a stranger, in trust to pay the debts of the person conveying, is, clearly, not a consideration sufficient even to raise an use upon a covenant to stand seized. Nor will it suffice to support an actionable promise; for in such case no consideration moves from the promisee of advantage to the *party promising*, or of detriment or charge to *himself*.

That the mere destination of the property to the object of paying the debts of the grantor is not sufficient to raise the use upon a covenant to stand seized, or bargain and sale, appears from *Lord Paget's*. (38) L. P., being seised in fee of the manor of B. by indenture between himself of the one part, and T. on the other part, in consideration that the said T. with the profits of said manor, would pay his debts, || and such sums of 430
money as were contained in such a schedule, covenanted to stand seized of the said manor to the use of the said T. for the term of twenty-four years, and after the expiration of the said term, to the use of W. P. his son, in tail, with divers remainders over. And it was there holden and agreed by all the Justices and the counsel on both sides, that the uses limited to T. and others were void for want of a consideration sufficient to raise an use; for the money, which was appointed for the payment of the debts, was to come out of the profits of the land of the said L. P. so that no consideration at all moved from T. But in the same case it was clearly agreed, that, if T. was to have paid the debts out of the profits of his *own* lands, there would have been consideration sufficient; by which must have been meant, that in such a case, there would have been a good consideration to support the conveyance as a bargain and sale; and, no doubt, had the case been so, the deed would have required enrolment.

||That such a conveyance for payment of debts, to which 431
no creditor is a party, cannot support itself, under these

(38) 1 Leon. 194.

statutes of Elizabeth, against purchasers, or discontented creditors, is a proposition flowing pretty clearly from the general analogy of the reported decisions, and deducible from the very plan and spirit of the statutes themselves. The Lord Keeper Finch, *anno* 27 Car. 2. in the case of *Leech* v. *Leech* (39) declared, that a trust for payment of debts generally is good against an *heir*, though no creditor be party to the deed, nor debt expressed in particular, nor covenant in the lease to pay ; but, at the same time, his Lordship observed, that he would not maintain it against a *purchaser*.*

But if a *creditor* be a *party* to such a conveyance to a trustee for payment of debts, however open the transaction may *still* be considered to the imputation of fraud from concomitant circumstances, there is a clear valuable consideration to support the
432 deed, since || forbearance of suit and mutual accommodation are expressed by the terms, or implied in the very nature of the transaction. In such a case there is a plain inducement to the party conveying, not founded upon a vain apprehension of *possible* danger, or an alarm excited by groundless menances, which, as we have seen in the before cited case of *Peat* v. *Powell* (40,) will not form a valuable consideration, for the conveyance, but a rational anxiety to avoid the expense and disgrace of a suit, which the party knows himself incompetent to defend. It is not the moral inducement that takes such a case out of the statutes of Eliz. (for to admit such a ground of support would be to furnish fraud

(39) Chan. Ca. 249. et vid. 2 Vern. 510. Turbach v. Marbury.

(40) Ambl. 387.

*In Widgery v. Haskall, 5 Mass. R. 144, it was decided that if an insolvent debtor assign his effects in trust for certain of his creditors, made by a conveyance to which they are not parties, nor assenting, this assignment is void as to other creditors ; for the grantors have no consideration, not even the discharge of their debts. So if a debtor assign his property to trustees, for certain creditors, and reserve a power to revoke, this is fraudulent and void, 2 Johns. Ch. R. 576. But an insolvent debtor may prefer one creditor to another, 2 J. C. R. 576 ; Hatch v. Smith and trustee, 5. Mass. 42: Barr v. Hatch et al. 3 Ham. (Ohio) 526.

By a statute passed in Vermont in 1843 all general assignments made by debtors for the benefit of creditors shall be null and void as against the creditors of such debtors. See pamphlet laws, 1843, p. 7.

with a convenient coloring, upon the danger of which enough has been said), but the less equivocal motive of temporal advantage.

What then would be the effect under these statutes of Eliz., of a conveyance to creditors, or to which creditors are parties, for the payment of debts, the remedy for which has been barred by the statute of limitations? for here it || seems that the 433 debtor can be influenced only by moral motives, since the plea of the statute is peremptory in the courts both of law and equity; and though moral obligation may be good to raise an *assumpsit*, it has not that ingredient of value which is constitutive of the effectual consideration within these statutes of Eliz. It may be observed, however, that in such a case the slightest acknowledgment revives the debt at law by removing the bar of the statute of limitations; so that, without doubt, the transaction, above supposed, involves an instantaneous restitution of legal remedies. And though, it is true, the transaction, in its first movement, was voluntary, yet it will be hard to maintain that real and *bona fide* creditors re-instated in their rights of action, without a suspicion attaching upon their conduct, shall be compelled to relinquish a security which had its birth in a conscientious though spontaneous act. Besides which, something of support may be derived to the transaction || from its analogy to those 434 cases of *ex post facto* consideration, which will be a future subject of discussion.

But it should seem to be out of dispute, that, where, as in the case of Lord *Paget*, above cited, a man conveys an estate to a stranger for the payment of debts out of the rents and profits, (which may be regarded as a clear voluntary conveyance) no creditor being party or privy (how far a bare privity and consent of a creditor or creditors proveable *dehors* the instrument might avail is doubtful,) or, as in the case last proposed, conveys to a creditor, for the payment of debts barred by the statute of limitations, if the persons interested under such deed bring their bill in equity for a decree to compel the performance of the trusts (which, as no *cestui que* trust is a volunteer as to his trustee, may also be obtained) the decree supplies a perfect consideration, and validates the whole *ab origine*; for it would be a strange thing if the fraudulent intent within these statutes could be charged upon the proceedings of a court of justice. And perhaps the *lis*

pendens || alone would defeat the title of a subsequent purchaser; for though the creditors may not have fixed the interest by original stipulation or bargain, yet if the simple conveyance to a trustee, without their knowledge, for their benefit, have consequently induced their forbearance of compulsory proceedings, there accedes to the transaction a sort of subsecutive consideration, which, if it do not change the nature of the conveyance, so far affects the character of claimants as to throw upon the person purchasing with *notice* the imputation of corrupt dealing. Thus it appears in the case of *Langton* v. *Tracey* ,(41) that a conveyance in trust to pay debts, though no creditor was party, nor any certainty as to persons appeared in the deed, nor in any schedule annexed, was decreed good against a subsequent purchaser with *notice* of the trust. And, upon the whole, these are cases of such danger to purchasers, that a prudent adviser can hardly recommend a title, which has been at all the subject of arrangements for the payment of debts remaining unsatisfied.

436 With respect to such conveyances or assignments ||as are taken by a creditor or creditors from the debtor by way of security or satisfaction, there can be no doubt but that they are *prima facie* good within these statutes of Elizabeth; for they clearly stand upon a valuable consideration. This was distinctly admitted into *Twyne's* case; where the debtor having made a deed gift of all his goods and chattels of the value of £300 to a creditor, whose debt was £400 to avoid the effect of an action commenced against him by another creditor, the court resolved that there being a real debt owing to the assignee, the avowed consideration for the assignment was perfectly good and unimpeachable; but the transaction, being in other respects fraudulent fell within the provisions of the statute 13 Eliz. So, in a late case (42) where L. A. being indebted to several persons, by a deed to which a creditor was a party, conveyed a part of his real and personal estate to a trustee, upon trust, to pay half of the rents and profits to the grantor, and the residue among

437 certain creditors named in a schedule; the ||deed being accompanied by none of those indications of fraud by which *Twyne's* case was distinguished, was held by the court of

(41) 1 Ch. Rep. 33. (42) 5 T. R. 429. Estwick v. Gaillaud.

King's Bench to be good and valid as against a creditor not named in the schedule.*

SECTION III.

A MAN ought not to be bountiful at the expense of justice. It 438 should seem clear, therefore, that nothing in the stat. 43 Eliz. c. 4. can be construed to give any stability to donations to charitable uses as against *bona fide* creditors, where the donor is indebted at the *time* of his making the gift. But as a disposition of property to a charitable use in the 43 Eliz. though purely voluntary, is *irrecoverable*, so that secret reservations and trusts are not to be presumed, considering too the general favor of the law to such public benefactions** when clear of all superstitious taint, it might be too much to say that debts arising upon *subsequent* con-

*When a debtor in embarrassed circumstances enters into an arrangement, either by deed or otherwise, with his creditors, to pay them a composition upon their claims, or to discharge their demands in full, by instalments at stated intervals; a private agreement between the debtor and one of the creditors who concurs or joins in the general arrangement, that the debtor or a third party for him, shall pay a further sum of money, or give a further or better security, than such as is provided for other creditors is void as a fraud on them. The creditors bargain for an equality of benefit as to payment and security; there is a tacit understanding that all shall share alike—*pari passu*; and it shall not be competent for one of them, without their knowledge, to secure any additional benefit or security to himself. Alsayer v. Spaulding 4, Bing. N. C. 407. 6 Scott, 204. Cockshott v. Bennett 7. T. R. 763. Jackson v. Loomis 4 do. 166. Leicester et al. v. Rose, 4 East, 372. Jackson v. Davidson, 4 B. and Ald. 695, 697. Wells v. Girling 4 Moore, 78; 1 Bro. & Bing. 447. S. C. Lewis v. Jones, 4 B. & C. 511, 515; 6 D & R. 567, S. C. Eaton v. Lincoln, 13 Mass. 424. 5 Johns. 333. 386. Case v. Gerrish, 15 Pick 56. Wiggin v. Bush, 12 Johns. 306. Clark v. White, 12 Pet. S. C. 178.

**As to the doctrine generally in relation to charitable donations, see 2 Ves. jr. 388. 11 Do. 241. 3 Do. 141. 10 Do. 534. 2 Br. C. R. 428. 4 Ves. jr. 418, 850. Porter's case 1 Co. 16 to 26. 4 Co. 104. 8 Co. 259, 261. Thelford's case. 2 Freem. 261. 4 D. and E. 264. where money was bequeathed, to found a Jewish synagogue, chancery has applied to founding a hospital. 1 Merivale 55, 100. White v. Hawkins, 7. D. & E. 759. 1 Dall. 72. 1 Binn 175.

tracts can prevail against a perfected gift or conveyance to charitable purposes, made conformably to the restrictions on the 9th of the late King. But the court of Chancery, in the distribution
439 of assets, where charitable bequests, and the claims of || creditors, come fairly into competition, give a decided preference to the latter, and show to the former so little respect, as, in case of a deficiency of assets, to make them abate in proportion with other legacies, (1) notwithstanding the favor they find in the civil law above other bequests. (2) The case of *purchasers* has been specially provided for by the statute of charitable uses. By virtue of that statute, and according to a train of judicial constructions, which in times nearer the date of the statute, were abundantly favorable to this destination of property, a purchaser is subjected to some disqualifications which do not affect him under the statutes of fraudulent conveyances. Thus a purchaser for valuable consideration will not prevail against a former voluntary conveyance, if he comes in with notice of the charitable use. Though it was resolved in *East Grinstead's* case, (3) that the notice must be certain, and personal to the purchaser. As, where land given to charitable uses was intended to be sold by act of parliament, and a bill was brought for that purpose, whereupon
440 it was said in the House upon the reading || of such bill, that the land was charged with a charitable use, in consequence whereof the bill did not pass, and the same land was afterwards sold to a member of the House, who was present at the reading of the bill on the former occasion, and delivered a speech upon the subject; this general notice was deemed insufficient to vitiate the title of the purchaser.

It was resolved also in the same case, in favor of these humane grants, that lands charged with a charitable rent continue charged even in the hands of a purchaser without notice. (4) But the purchaser under the statute 43 Eliz. c. 4. besides the disqualification arising from notice, has been subjected, from the same tenderness of the courts for charitable uses, to very strict constructions, as to the valuable consideration necessary to support his claim. The word *valuable* is rigidly bound down to things of a

(1) P. Wms. 265. 421. 675. (2) Fielding v. Bond, 1 Vern. 230.

(3) Duke 64. (4) Duke 159.

pecuniary measure and appreciation, so that even marriage has been said to be no valuable consideration within this statute of charitable uses. (5) So also, if the consideration of the
|| sale be things of shew or arbitrary worth, as jewels, &c. 441
or if the consideration be executory, (6) or if the consideration be mixed, as money and natural affection, (7) or if an inadequate price be given, (8) these charitable uses, it is said, will prevail against a conveyance to a purchaser. But within the description of valuable considerations under this statute are included plate of a known weight, release of debts, of arrears of rent, or of a covenant broken; but a mere possibility in land has been holden to be no consideration within this statute of charitable uses.

SECTION IV.

|| A *Donatio causa mortis* must upon every principle 442
of good policy and analogous reasoning be void as against the donor's creditors.* Until the donor's death the gift, being incomplete and suspended, seems *clearly* to be within their reach. And the consideration of mortality can avail nothing; for nothing ought so to press upon the recollection of a dying man as the obligation of discharging his debts, and nothiug can be sanctified by death which was corrupt *inter vivos*. Pere Williams has subjoined to his report of the case of *Drury* v. *Smith*, (1) a memorandum of a case between *Smith* v. *Casen* determined 8th December, 1718, where, jewels having been given by way of *donatio causa mortis*, it was doubted by the Master of the Rolls whether this was good against the debts of the deceased; and the reporter adds, that it seems *not*; for ||being 443
given in case of the donor's death and in the nature of a legacy, it is fraudulent against creditors. And with this agrees the imperial law. *Sicuti legata non debentur nisi deducto ære*

(5) Duke 177. (6) Duke 177. (7) Ibid. (8) Ibid.

* Smith v. Smith, 2 Stra. 955; 2 Black. Com. 514; 2 Ves. jun. 120; Executors of Blake v. Lowe, 5 Desaus. 263.

(1) 1 P. Wms, 405.

alieno aliquid supersit, nec mortis causa donationes debebunter; sed infirmantur per æs alienum. (2) And if we suppose debts to be contracted between a man's last sickness and death, it appears to be the sense of the civil law, that such subsequent debts shall invalidate the gift; though it seems to be only following up the analogy between these *donationes causa mortis* and legacies. *Si æs alienum interveniat, ex re mortis causa sibi donata nihil aliquis consequetur.* (3) But whether the transfer partakes most of the quality of a *gift legacy*, being still only voluntary, it should seem to be equally void as against creditors, after the donor's death. And though perhaps it may not fall, as a *legacy*, within the province of an executor to administer, yet, if it be void as a *gift*, it must come to the executor as assets for the satisfaction of creditors. And if an action were commenced against an executor, without a
444 sufficiency of other assets, ‖for a debt of the testator, perhaps by such suit, the property in the subject of a *donatio causa mortis* might be considered as fixed in the executor in quality of assets for the satisfaction of the judgment, and so as to entitleh im to an action of trover for the gift against the donee. *(a)*

In the case of *Allen* v. *Arme*, (4) E. A., having survived his wife, who had died without issue, and having been formerly servant to his wife's mother, who had given a portion of £600 with her daughter, part of which had been laid out in the purchase of the copyhold lands in question, being dangerously ill, out of respect to the memory of his wife, and kindness for her nephew, voluntarily surrendered the lands to the use of himself for life, with remainder to H. A. the nephew in fee; but afterwards recovering and marrying again, settled the same lands upon his second marriage. Here, though it was insisted
445 on the part of those claiming ‖under the settlement on the second marriage, that the surrender having been made by A. in the time of his sickness must be intended by him not to

(2) D. L. 35, tit. 2. 1. 66, § 1. (3) Ibid.

(a) Vid. Strange 777. and consult the case of Tate v. Hilbert, 2 Ves. Jun. 111.

(4) 1 Vern. 305.

bind if he recovered of that sickness, it being merely voluntary, and that his intentions appeared to be so by his having, after his recovery, settled the same lands before his marriage on the plaintiff his second wife and his issue by her, who were to be taken as purchasers, and as such were entitled to relief against a precedent voluntary surrender; yet the Lord Chancellor declared, he would not infer any intention contrary to the surrender, and dismissed the bill, as there did not appear to be any fraud or trust in the case. The reporter has left us to guess at many circumstances of the case; but there appear in it several ingredients which materially differ it from the case of *Douglass* v. *Ward*, (5) cited in a former part of this essay. The real apprehension of the approach of death is certainly not very consistent with the supposition of any views of fraud towards a subsequent purchaser, and least of all a purchaser by marriage, for marriage and mortality do not appear together ‖in 446 the same prospect. But what degree of sickness shall induce such serious apprehensions in the patient as to banish all temporal prospects, is a point lying beyond the reach of legal evidence; and therefore the circumstances of a man lying in a dangerous sickness furnish no certain testimony of innocence under these statutes. But it appears from the report, that the nephew had also married since the surrender in his favor, and probably before the second marriage of the surrenderer, and the nephew's widow, who was defendant in the cause, which was revived, after the deaths of the uncle and nephew, between their representatives, claimed by a surrender upon *her marriage also*. So that there appears to have been a consideration *ex post facto* to support the title of the defendant. Probably the second settlement made by the first surrenderer, rested only in covenant, which was the reason of the application to a court of equity; and, in this view of it, we perceive only three particulars which differ it in circumstances from the case of *Douglass* v. *Ward*, where a voluntary settlement by a husband upon his first wife ‖was set aside in favor of a jointress under a second mar- 447 riage: 1. the sickness of the voluntary settler, which repels the suspicion of any prospect of a second marriage; but which

(5) 1 Chan. Ca. 99. Vid supra 367.

as has been observed, is equivocal testimony: 2. the subject of the settlement's being copyhold, as to which, perhaps, some question has been made whether or not, it comes within the statute 27 Eliz. c. 4. (6) although the point at this day seems not to remain in much doubt *(b)*: and 3. the marriage of the volunteer and his settlement of the estate upon his marriage, which brings the case within the principle of some of those *ex post facto* considerations, which will be treated of in a subsequent part of this volume.

SECTION V.

448 || In reviewing the cases decided upon the statute 13 Eliz. we may observe the distinction in favor of advancements to children, by persons not indebted at the time, to be pretty clearly and uniformly maintained in the opinions of the greatest lawyers: and by adverting to this distinction, we are able to reconcile many judgments, which might otherwise appear discordant. Thus, where Lord Coke sitting as Chief Justice in the case of *Tyrer* v. *Littleton*, (1) declares his opinion, that natural love to a child must be regarded as a good consideration within the proviso of the statute 13 Eliz., and in *Twyne's* case affirms, that nothing but a valuable consideration is a good consideration within the statute, and carefully distinguishes between a strictly valuable consideration and the consideration of love and affection, we are to understand him 449 distinctively with reference to the subject ||matter. Accord-

(6) Vid. Doe v. Routledge, Cowp. 705 et seq.

(b) How far surrenders of copyhold lands are within the statute 13 Eliz. *with respect to creditors*, may, perhaps, be doubted, since it may be said, that they have not the effect of delaying, hindering, or defrauding creditors, who cannot issue process to levy a debt upon a copyhold estate. It has been determined not to be an act of bankruptcy on a similar ground. *Ex parte* Cockshot, 23 March, 1792.

(1) 2 Browal. 189.

ing as he speaks of natural love as an availing or void consideration within the statute, his meaning must be referred to cases wherein the debts arose upon prior or subsequent contracts:* as where, in *Tyrer* v. *Littleton*, he says, that affection of blood is good within the proviso, *except it were to defraud creditors*, and in *Twine's* case, affirms that such conveyance in consideration of natural affection *by a person indebted*, is fraudulent within the statute of Elizabeth. It is worthy of remark, that the whole strain of Lord Coke's reasoning in the last mentioned case shews it to be his opinion that the statute 13 Eliz. should be so construed as to make it substantially operative to the benefit and protection of *bona fide* creditors; in so much that a motive abstractedly good and moral shall, by the presumption arising upon this statute, be *intended* fraudulent, wherever the grantor stands indebted at the time, against his *bona fide* creditors. That great lawyer cannot therefore well be understood to rest this construction so much upon any *particular* || probability of actual fraud, as upon the general policy of 450 the statute, the comparative merit of adverse claimants, and an equitable balance of considerations, for his words are, "equity requires, that such gift which defeats others, should be made on as high and as good consideration as the things which are thereby

* Where there is no actual fraudulent intent, and a voluntary conveyance is made to a child in consideration of love and affection, if the grantor is in prosperous circumstances, unembarrassed and not considerably indebted, and a gift is a reasonable provision for a child, according to his state and condition in life, comprehending but a small portion of his estate, leaving ample funds unincumbered for the payment of the grantor's debts, then such conveyance will be valid against debts existing at the time. But though there be no fraudulent intent, yet if the grantor was considerably indebted and embarrassed at the time and on the eve of bankruptcy; or if the value of the gift be unreasonable, considering the condition in life of the grantor, disproportioned to his property and leaving a scanty provision for the payment of his debts; then such conveyance will be void as to creditors. Salmon v. Bennett, 1 Conn. R. 525. But see Chancellor Kent's opinion in Read v. Livingston, 3 J. C. R. 481; see also Hendee's Lessee v. Longworth, 11 Wheat. 213; Brackett et ux. v. Wait et al. 4 Vt. R. 389; Lush v. Wilkinson, 5 Ves. jr. 384; Townsend v. Windham, 2 Ves. sen. 11; Roper's Husband and Wife, 307-8; Verplank v. Sterry, 12 Johns. 557; Parker v. Proctor et al., 9 Mass. 390; Mason v. Rodgers, 1 Root, 324; Bennett v. Bedford Bank, 11 Mass. 421.

defeated." And he founded his opinion, in part, on an analogy to the principles on which it had been holden before the statute of uses, that feoffments made only in consideration of blood and affection were unavailing to destroy an use raised on valuable consideration, but should destroy an use raised on consideration of nature, because in the last supposition both considerations are in *equali jure.*

If the act 13 Eliz. were to be wholly dependent for its operation on the particular circumstantial likelihood of existing fraud in the individual case, a creditor by the imperfection of his remedy upon the statute, would be driven into equity for relief, where the ascendancy of his title woul certainly be recognized; for as was observed by Lord Northington in the case of *Partridge*
451 v. *Gopp* (2) before cited, "no ‖man is *there* considered as having such a power over his property as that he can defeat his creditors by a conveyance *without consideration.*" It may be remarked too, that the very *language* of the courts, declaring a deed fraudulent *as against* creditors, discovers it to be their sense, that the statute imports a *constructive* fraud irresistibly conclusive in favor of *bona fide* creditors claiming against mere gratuitous conveyances; *(a)* and, perhaps, the Lord Keeper may be understood in a sense correspondent to this notion, when in the case of *Fletcher* v. *Lady Sidley*, (3) he expressed the inclination of his opinion to be, that, "fraudulent conveyances are *made so* only by the several statutes made for that purpose."
452 ‖ But the partiality both of courts of Law and Equity to *bona fide* creditors is not extended to *all* that class of claimants in *equal degree;* it loses so much of its force, where the demands of creditors arise upon *subsequent* contracts, as in such

(2) Ambl. 598.

(a) Absolute fraud makes every instrument fraud to all intents and purposes. It searches, penetrates, and vitiates a transaction *fundamentally.* But if fraud in this *absolute* sense were intended by the statute, with what propriety could we understand a deed fraudulent within the statute to pass a legal interest and bind a man's representatives? So far is this from being consistent with legal principles, that covin is held to vitiate every title, however legitimate in its creation according to the rules and solemnities of law.

(3) 2 Vern. 491.

cases to require some accessory indications of fraud, if the previous conveyance be founded upon motives of such probable sincerity as the affections of consanguinity. Where a man is indebted, the sense of obligation to discharge his debts may be supposed to press unceasingly upon a conscientious mind ; and where such moral calls have lost their force, no credit ought to given for purity of motive under the most plausible pretences of inducement. The very proximity of blood raises rather the idea of confederacy than affection in such unconscientious transactions. But a person *uninvolved* may with great reason and justice make provision for his children ; and as the consideration of blood is a motive of specific virtue and agency in our law, it is consistent with principles both moral and technical to stamp it with a legal preference where it is opposed to ||debts 453 which *wholly* originate in *subsequent* contracts, and are unattended with any particular marks of prospective contrivance.

It appears, however, from the cases already cited in this volume, that although *subsequent* creditors must yield to conveyances supported by such privileged considerations,*(b)* yet that where a case stands unaccredited by ||these natural in- 454 ducements, debts arising upon subsequent contracts will prevail, by force of the 13 Eliz. against spontaneous gifts, however justified upon moral reasons. In the case of *Jones* v. *Marsh*, (4) we have seen that Lord Talbot treated it as a question, how far

(b) What relations are embraced within the scope of this privileged consideration may be a question. Considerations to raise uses, and the force of the gift in frank marriage extended to collaterals, Litt. sect. 17. Dyer 287. a.; but it seems that conveyances by tenants by chivalry, in consideration of natural affection to collateral relations, were not within the 32 H. 8. c. 1. as children's children, and all the posterity in *linea recta*, were Cro. Jac. 157. 6 R. 75. 77. and in Dyer 296. b. it was resolved, that bastards were not within the meaning of the said act 32 H. 8. c. 1. which, by preferment of children, intends only the lawful progeny of the donor. See also Thornton's case, Dyer 345. a. Consideration of natural affection will not raise an use to a bastard; and see Dyer 374. a. S. P. Neither will equity supply the want of a surrender in behalf of a natural child. Prec. in Chan. 475. But see 1 T. R. 96. that bastards are within the meaning of the marriage act; and the observation of Buller, J. that the rule that a bastard is *nullius filius*, applies only to inheritances, and that it was so considered by Lord Coke.

(4) Ca. Temp. Talb. 65.

a court of equity could set aside family settlemests, made without any consideration, as fraudulent against a creditor who lends his money many years after the settlement; but enough, perhaps, has already appeared in this essay to shew that such question has been answered by the courts in favor of family settlements. It is to be regretted that the reporters of cases, wherein creditors have claimed against voluntary settlements, have frequently omitted to take notice of the order of time in the date of the transactions. *Sagittary* v. *Hide*, reported by Vernon, leaves this fact unascertained, though we may in part collect from the argument of the counsel for the plaintiff, that the origin of the bond debt, on which the plaintiff claimed, was *posterior* to
455 the settlement made by the obligor; and then, according ‖to the terms of the above distinction, the settlement could not be shaken.

A remarkable case was quoted at the bar in *Sagittary* v. *Hide*, which is there called *Lenthall's* case, and which is to be found in Keble under the name of *Mountford* v. *Ranie.* (5) Upon evidence to a jury in a trial at bar, it appeared that the plaintiff's title was under a judgment on a bond given by one G. to Sir John Lenthall, who was sheriff, and lessor of the plaintiff, which judgment was obtained on a *scire facias* against the heir and tertenants claiming under the ancestor and obligor. The defendants set up a settlement by recovery to the use of trustees for sixty years, subject to the dispositon of the grantor, which conveyance was made fourteen years before the ancestors became security for the prisoner. Keeling, J. and Rainsford, J. *firmly* agreed, as the reporter says, in pronouncing the conveyance fraudulent, although the plaintiff had only *become* a creditor
456 by the escape of the prisoner, ‖and they affirmed it to be fraud apparent *(c)* in their directions to the jury. But Twysden said that there could be no such intent at the time of the making of the settlement, the party not being *then* at all indebted, and afterwards only *collaterally*; and the verdict found by the jury corresponded with Twisden's opinion. Whether the

5) Keb. 499.

(c) It may not be unuseful to observe that *apparent* in its legal sense is *manifest.*

collateral object of the condition of this bond, and the circumstance of its being grounded on no original debt or contract, would now in a court of judicature attach a preference to the opinion of Twisden, is a point that may long remain in doubt.

It has been determined, that where damages are recovered in an action founded in *maleficio*, (6) as where a man is prosecuted by action for criminal conversation with the plaintiff's wife, a conveyance to trustees for the payment of debts, though professedly intended to avoid the consequences of the suit commenced, shall not, in equity at least, be treated as fraudulent by the
|| recoverer in the action. But though this case resembles 457
that of *Mountford* v. *Ranie* above cited, in the circumstance of there being no direct original contract before the making the conveyance, yet all comparison is at an end when we consider that the point in the last-mentioned case, which was in chancery, was the legality of the preference given to *bona fide* creditors upon contract, over a claim for suppliciary damages. And it may be observed that in *Lewkner* v. *Freeman*, the plaintiff, though postponed to creditors upon pecuniary contracts, was let in upon the surplus after the creditors by contract were satisfied; but in *Mountford* v. *Ranie*, the claim of the bond creditor was *radically* subverted by the verdict of the jury in correspondence with Twysden's opinion. The import, however, of this case of *Lewkner* v. *Freeman*, must be bounded to its particular characteristic circumstances, and we must be cautious not to confound with its principle the case of a subsequent *creditor by contract* claiming against a conveyance to a trustee for the payment of *scheduled debts*. Nor,
on the other hand, will the case support an ||inference that, af- 458
ter suit founded in *maleficio* has been instituted, a conveyance by the defendant for any *other* purpose than the payment of *bona fide* subsisting debts upon contract, or for a plain valuable consideration, can maintain itself against the plaintiff's subsequent title to damages by recovery in the action. The decree of the court vindicated only against the statute 13 Eliz. the justice and legality of preferring the claims of present creditors upon pecuniary contracts, to a future possible right to accrue by a penal award.—And we are to observe that the conveyance by

(6) Lewkner v. Freeman, Ca. Abr. 149.

the defendant in *Lewkner* v. *Freeman*, was after the action commenced, but before the verdict. So that we can by no means infer from it that, in such a case, such a conveyance by a defendant of lands after verdict and before judgment, or of goods after judgment and before execution, would be effectual against
459 the recoverer in the action. *(d)* ‖Upon the whole, perhaps, the true spirit and exigency of the statute 13 Eliz. circumscribes the case within the strict compass of its literal authority.

It should seem that the distinction above taken between debts *precedent* and debts *subsequent* in the case of a conveyance by way of family settlement, or by way of provision or advancement for a child or children, may branch into a sub-distinction between demands *fundamentally* originating *after* such conveyance, and such as arise upon an obligation prior in date to the conveyance, with a condition to perform some collateral act; for it cannot be said, that an obligor in a bond, before the pecuniary demand arises by the forfeiture, can be ignorant of his liability or danger, so as to exempt him from the imputation of fraudulent intent upon this statute of Eliz. And indeed if the construction
460 of this statute can properly be influenced by technical ‖reasoning, it may be remarked that there is a present debt existing at law immediately upon the execution of the bond, the condition being a condition subsequent only, and operating merely upon the remedy, without in any manner changing, diminishing, or qualifying the *debt* itself. And whether the person making such voluntary settlement be principal or only surety in the bond, can make no difference in this view. By attending to the case of *Mountford* v. *Ranie*, we perceive that Twysden J. seemed to apprehend a difference, as to the application of the statute between the cases wherein the subject matter of the condition is collateral to the obligation, and those wherein, as in bonds for the payment of money, the sum in the condition is

(*d*) For this would be strictly within the words of the statute, being in delay of an execution; and see Brook tit. Collusion, fo. 140. that a gift of goods between *judgment* and *execution* in an action founded on a *tort*, is void at common law if there is no consideration. See also Dyer 295. a. that an elegit was granted of lands which the defendant in *waste had* on the day of the *verdict* given.

collateral to the obligation, and those wherein, as in bonds for the payment of money, the sum in the condition is parcel of the obligation; but the diversity seemed not to meet the sentiments of the other judges.

But it does not appear that damages arising upon a broken covenant, entered into previously to a voluntary settlement made by the covenantor before the breach, has been considered as entitled to the same extent of remedy or relief at law or in equity.

The ||case of the *East India Co.* v. *Clavel et al.* (7) is of 461 some importance to this point, which case was shortly this.

A. agreed with the East India Company to go as President to Bengal, and entered into a bond of £2000 penalty for the performance of articles; but before he set out he made a settlement of his estate, and, among other things, he declared the trust of a term of one thousand years, to be for the raising of £5000 as a portion for his daughter, who afterwards married J. S. whose fortune was £700 *per annum:* J. S. before his marriage had been advised by counsel that the portion was sufficiently secured, and afterwards, on her death, had in compliance with her request, expended £400 on her funeral, but had never made any settlement on her. A. afterwards embezzled the goods and stock of the company to a considerable value, and died; and the Lord Chancellor Harcourt decreed in favor of the bond only, to the amount of the penalty, but he would not for the sake of the actual damage sustained by the plaintiffs, and claimed by virtue of the articles, break in upon the settlement, ||which he declared to 462 be a resonable, prudent, and honest provision.

Statutes and recognizances which are obligations of record, by which all the fee-simple lands, which the conusor had on the day on which the acknowledgement was taken, are liable, into whose hands soever they may afterwards come, whether by sale or otherwise: so that by this sort of security for a debt, all question upon this statute 13 Eliz. *(a)*, as to lands, is avoided. But with respect to chattels the case perhaps is different, for although all leases and other goods and chattels of the conusor or debtor are liable to be extended either in a fresh action of debt, or by

(7) Prec. in Chan. 377.

(*a*) Such creditors by statute are purchasers within the 27 El. Vid. supra 393.

execution immediately upon the statute, which he has in his possession or to his use at the time or on the day of the execution, yet it has been holden that a *bona fide* sale for valuable consideration, without notice after judgment, and before execution, is good at common law, and as it should seem also within the statute 13 Eliz. (8).

SECTION VI.

463 A Distinction has been taken between cases where conveyances are made by the party himself, and where the property is purchased in the name of a third person to whom the conveyance is *originally* made by the direction of the purchaser. For, although there may well exist in the case last supposed such badges of fraud as will entitle to *equitable* relief, it has been holden not to fall directly and legally within the provisions of the statute of
464 27 Eliz. *(a)* Thus where || (1) L. purchased a manor in the name of Lady G. his daughter; and afterwards kept courts and made leases in his own name, and continued to take the profits, and then sold the manor to Sir S. M. and died, the title never having been questioned by Lady G. in the lifetime of her father; it was resolved by the court, that it was not within the statute 27 Eliz. c. 4. although there were many badges of fraud. And in the case of *Proctor* v. *Warren*, (2) it was said by Lord King, that he did not know, that it had ever been determined, that if a man being indebted, has an estate *originally* conveyed to his children by way of provision for them, it should be subject

(8) Vide Sir Gerard Fleetwood's case, 8 Rep. 171.

(1) Lady George's case, Cro. Car. 550.

(2) Vin. tit. Frand Q. a. 2. Sel. Ca. in Lord King's time 78.

(a) Such voluntary donations by purchase and original conveyance are expressly within the statute of 1 Jac. 1. c. 15. of bankrupts, so that the commissioners may sell the lands so purchased in the name of wife, children, or friends. They are also expressly within the statute 13 Eliz. c. 4. by which the lands of the King's officers and accountants were made liable for their debts to the crown.

to his debts.* The Lord Keeper Wright inclined to that opinion in the case of *Fletcher* v. *Sidley*, (3) where Sir S. C. having purchased a lease of a house in London, in which he dwelt, in the name of Sir F. W. and having taken a declaration of trust to permit Sir C. to enjoy for life, and then to hold the remainder in trust during the residue of the term, the question before the court was, whether the lease of the house so purchased in trust, in the name of Sir || F. W., Sir C. S. being dead, should 465 be liable to the creditors, and brought into the account of the personal estate. It was insisted by the counsel for the defendant Lady S. that "the lease could not be assets of Sir C. S. because he had never had the *term* in him but was only to enjoy for life, the remainder being given to the defendant, for the residue of the term. And that it being so settled, *upon* the purchase, it could not be liable to the creditors of Sir C.: for as, in his lifetime, he might have given the *money* to the defendant, so, by the same reason, he might direct a conveyance to be made to her, or a declaration of trust for her benefit. And it was said, if a man purchases a *freehold* estate to himself for life, remainder over to another, such remainder shall not be void or fraudulent, even as to creditors by bond or judgment; for it was a new pretence to say that a man may make a *purchase* fraudulently; a man might *alien*, on purpose to defraud his creditors, and the statutes of

*The English authorities concur for the last two hundred years in this general principle; that if A. buys land with the money of B. and takes a deed to himself, it is a resulting trust and may be shown by parol. 1 P. Wm. 112, 322; 1 Alk. 59; 1 Cruise, 471, 477; 2 Vent. 361; 1 Wils. 21; 1 Ch. Ca. 39; 5 Bac. Abr. 394; Fearne, 289, 290; 2 Atk. 50, 148; 3 P. Wms, 22 note; 1 Johns. R. 45; 1 Johns. Ca. 153, Jackson v. Stembergh; and 205 Neilson v. Blight; 2 Johns. Ca. 278, Murry v. Trustees of Kingwood; 1 Johns. R. 45; 3 Johns. R. 216, Foot et al. v. Colvin et al; 2 Story's Eq. J. § 1201. note 2; Pinney et al. v. Fellows, 15. Vt. 525; Hurd v. Silsby and trustee, 10. N. H. R. 168; Rundlett v. Dole and trustee, Do. 458: Parsons v. Parsons, 9 Do. 309; Paul v. Crooker, 8. N. H. 288; Page v. Page, 8. Do. 187. Homer et al. v. Savings Bank, 2 Conn. (2d s.) 478; Dean v. Dean, 1 Do. 285; Ingraham et al. v. Wheeler, Do. 277; Donalds et al. v. Plumb et al. 3 Do. 477; Bull et al. v. Bull et al. Do. 47; Banks v. Judah et al. 145; Hudson v. Wardsworth et al. Do. 348; Stroug et al. v. Strong et al. Do. 408; Chamberlain et al. v. Thompson, 5 Do. 243; Bates et al. v. Coe, Do. 280.

(3) 2 Vern. 490. but see 2 Vern. 70 Kingdome v. Bridges.

fraudulent conveyances would reach such alienation, but that as to *purchasing* || for another, a man might do it or let it alone at his pleasure;" and to that opinion the Lord Keeper inclined. *(b)*

(b) We must be careful, however, not to infer from these cases that a debtor can screen his property from his creditors by taking an original conveyance to another *in trust for himself.* It is plain that creditors might reach such trust property in a court of equity, and in cases falling within the statute 29 C. 2. of frauds and perjuries, by their executions at law. And where, from the circumstances of the case, the suspicion of a trust for the person advancing the money arises, as in the case of Stileman v. Ashdown, before cited, from the want of aptitude in such original conveyance to the professed object of the purchase, a court of equity will let creditors in upon the property. It seems, however, that where the object of such original conveyance is the advancement of children, without any particular badge of fraud, the children will prevail in equity against the creditors of the parent, even though he were indebted at the time of the purchase: such, at least, appears to have been the opinion of Lord King in Proctor v. Warren, and the effect of the cases above cited. The reader will observe, that in the cases of Lady George and Fletcher v. Sidley, the property in dispute was the remainder after the purchaser's death, which was an entire new estate, that had never passed *through him.* But during the life of the purchaser, as he had the beneficial interest for his life, such interest was liable to his creditors: and this probably was the meaning of Lord Hardwicke, when, in the case of Stileman v. Ashdown, he put the case of a father purchasing an estate for himself for his life, with remainder to his son in fee, and declared that this should not prevail against the creditor. His Lordship supposed the father to be living. In the cases above cited from Croke and Vernon, the dispute was whether the *remainder* should be assets for the satisfaction of the purchaser's creditors.

Where the purchase by the father has been originally made in the son's name, the father's enjoyment of the rents and profits during his own life has not prevented the benefit of the advancement to the child, by creating an implication of trust for the parent. See Elliot v. Elliot, 2 Chan. Ca. 231, and Lamplugh v. Lamplugh, 1 P. Wms. 111; where it was said that the father's taking the profits must be intended to be done as guardian to the son. But this construction cannot be made if the father takes the profits after the majority of the son. Loyd v. Read, 1 P. Wms. 607. Where a purchase has been made by a father in his *own and son's* name, as in Stileman v. Ashdown, it has been holden to be a weaker case in favor of the son, than where the conveyance is taken to the *son only.* And, accordingly, the son has been denied the benefit of survivorship, as against a judgment creditor of the father. See the said case of Stileman v. Ashdown, 2 Atk. 481. Pole v. Pole, 1 Ves. 76.

|| It seems, also, that in some cases, where a man has only a power over property in another's right, as where he is the husband of an executrix or administratrix, || his 468 conveyance of any chattel interest, which was assets in her hands notwithstanding his being indebted at the time, cannot be fraudulent within these statutes of fraudulent conveyances. Thus in the case of *Ridler* v. *Punter*, (4) it was found upon special verdict, that W. and his wife being possessed in right of the wife, of a term which she had as administratrix to C. her first husband, and being indebted by contract, granted the term to Coleman, to the use of himself and his wife for their lives, and after to the use of Coleman. The creditor obtained judgment against W. for his debt, and an execution of *fieri facias* being awarded to the sheriff, he for this debt of W. sold the term to the plaintiff in that cause. The question was, if the sale were good, on which the opinion of the court was clearly in the negative; for the term, which was possessed by the husband only in right of the wife as administratrix, while it continued in his possession unaltered, was certainly not extendible for his debt; neither if the husband himself had possessed it as executor would it have been extendible for his proper || debt. So that, by the court, this grant 469 was out of the statute 3 H. 7. c. 4. and all other statutes of that nature. (*c*)

In this case, though the grant of the term by the husband, had the effect of altering the property, yet the thing conveyed vested *originally* in the grantee, without passing through the husband, or ever having been, for an instant, in his absolute possession; nor could he be said to have parted with any property of his own, in any understanding or construction whatever. He had merely a *power* over the thing without any estate or ownership whatever, upon which the claims of his creditors could attach. He had the right of alienation; but such right of alienation was a power thrown upon him by the legal incapacity of his wife, and his prerogative as husband, and not derived to him from any unity or community of estate or title.

(4) Cro. El. 291.

(*c*) A description that clearly included the 13 Eliz. c. 5.

If, however, he had granted the term, in trust to be || disposed of as he should appoint the same, the *estate* in the thing would have been altered, and an equitable interest would have been set up in himself; and though in the former case, there being no fraud either at common law, or upon the statutes, there seems to have been no ground for a court of Equity to interfere; yet in the case last supposed, there is authority for saying that, if the husband were to make a *voluntary appointment*, under such power reserved upon the grant, a court of Equity would follow the rule upon these statutes of fraudulent conveyances, by treating the appointment as void, and the interest as subject to the satisfaction of the husband's debts. For by the alteration of the property, in this case, the husband would have drawn to himself an estate in the thing, and his subsequent appointment would have operated as an equitable conveyance of the chattel interest, so as to let in the check which the law has imposed upon all voluntary dispositions.

This reasoning is fortified by the case of *Ashfield* v. *Ash-*
471 *field*, (5) where it appeared on the Master's report, || that Sir John Ashfield by deed had assigned the personal estate, to which the defendant his wife was entitled as executrix of her former husband, to trustees upon trust for such uses, intents, and purposes, and for such person and persons as he by deed or will should direct or appoint, and in default of such appointment, in trust for himself, his executors, administrators, and assigns, and afterwards by his will devised his estate to his wife and children, and died. The court determined that the property was altered, and the trust being general, as he should *direct or appoint*, he was *owner* in *equity*, and had the power and disposal of his estate during his life. And because the disposition and appointment of it, which Sir John Ashfield had made to his wife and children, was but in the nature of a legacy, and no notice was taken in the will of the power of appointing, it was decreed to be assets, and liable to the demands of creditors.

(5) 2 Vern. 277.

SECTION VII.

‖ But in looking into the authorities on voluntary appointments under general powers, the principle of the case of *Ashfield* v. *Ashfield* last above cited appears capable of expansion; for whether the power had been executed by deed or will, the determination according to the grounds of the resolution in *Townsend* v. *Windham*, (1) and other cases, ought to have been the same.* The circumstances of the case of Lord *Townsend* v. *Windham*, as far as it regards the points now under consideration, were as follow: J. W. A. being entitled to a very large estate for life, remainder to his first and every other son in tail male, remainder to his nephew W. Windham in tail, with limitations over, and having only daughters, and no probable expectation of sons, after the marriage of his nephew executed an indenture of demise, in performance ‖ (as it set forth) of certain promises and agree- 473
ments made by the uncle before the marriage, whereby he let him into immediate possession of part of the estate, without paying any thing for it; but W. Windham thereby covenanted that if by the settler's death, without issue male, it should happen, that W. Windham or any of the heirs of his body should ever come into possession of the estate, he would permit such person as the testator should, by deed or will in his lifetime, appoint for that purpose, to enter and receive the rents and profits of the estate, for so long a time as W. Windham should enjoy it in the uncle's lifetime. Afterwards the uncle, by deed, directed all and singular the lands, tenements, manors, and hereditaments, and all his estate, title, right, and interest, to S. C. his heirs, executors, administrators, and assigns, to take the rents and profits thereof, from and immediately after his death, in trust nevertheless to and for the sole and separate use of Catherine, his daughter, her heirs, executors and administrators.. After the uncle's death a bill was brought by his creditors for an account and satisfaction out of his assets. And the ‖ question was, whether Catherine 474
the daughter should take the benefit intended her by this

(1) 2 Ves. 10,

*See 1 D. Abr. Ch. 32. a. 13. sec. 10. and cases there cited.

appointment, or the interest under the power should be liable to the creditors of the deceased.

Lord Hardwicke, in this case, strongly denied the ***distinction*** which was attempted to be established between an appointment by ***will*** and an appointment by ***deed***, which, he said, would elude the rule of justice by which the court was governed in these cases. If, said his Lordship, there is a power to execute by ***deed*** or ***will***, though it be executed by ***will***, it operates not ***as a will (a)*** to that purpose, but as an ***appointment***, and not as an appointment of a man's own assets, but of the estate of another. And his Lordship finally decreed, that the daughter could have no specific lien upon the fund, unless there was a surplus after debts paid; and that the appointment was void against the creditors, for
475 whose || benefit, whatever arose by the deed out of the estate of W. Windham ought to be considered as part of the general assets of the deceased.

The same doctrine has prevailed where the subject of a power of appointment has been merely a ***sum of money***, as appears by the cases of *Thompson* v. *Towne*, (2) *Lascelles* v. Lady *Cornwallis*, (3) *Hinton* v. *Toye*, (4) *Pack* v. *Bathurst*, (5) and *Troughton* v. *Troughton*. (6) It is to be observed, however, that these were all cases of general powers by which the appointment was unrestrained to any particular objects, *(b)* for where the persons to be benefitted are described by the power, there is
476 no pretence or semblance of ownership || in the appointor, so as to raise a title in his creditors as against his voluntary appointment. But where a man has such a power of disposition over an estate, or interest as enables him to vest it in his own re-

(a) Vid. Bath and Montague's case. 3 Chan. Ca. 100. per Lord C. J. Holt.

(2) Prec. in Chan. 52. 2 Vern. 319. (3) Prec in Chan. 232. 2 Vern. 465.

(4) 1 Atk. 465. (5) 3 Atk. 269. (6) 3 Atk. 656.

(b) In the case of Hinton v. Toye, 1 Atk. 465. the creation of the power was coupled with a recommendation to the appointor to appoint to charitable uses, but it was left optional with him to pursue the recommendation or not. And the court declared that as he had the power of giving it to whom he pleased, he was undoubtedly the owner of it; and the interest was decreed to be liable to his creditors, though an appointment had been made to the children of a poor clergyman, and expressed to be in pursuance of the direction of the person giving the power.

presentatives, a court of equity will consider this as an *ownership*, for, as was said by Mr. Verney, Master of the Rolls, in the case of *Hinton* v. *Toye*, there are three ways in which property may be exercised,—by enjoyment in one's own right, by transferring a right to another, and by representation.

Where a general power of disposition is given to a man to be exercised or not as he pleases, until he executes the power he does nothing to affirm *(c)* the interest in himself, so as to constitute it assets for the || benefit of his creditors. But 477 where he has made a voluntary appointment, the court of Chancery considers a transitory ownership as gained to the appointor by this act of disposition, but stops the interest in its passage to the appointee, and turns it into that channel in which in conscience it ought to go.

SECTION VIII.

||The validity of bonds are more frequently the subject 478 of discussion and determination in courts of equity than of law: for every bond imports a sufficient consideration at law, but a court of equity repels a voluntary bond from its rank, and postpones it to debts (*a*) upon valuable contracts (1). While the obligation rests merely in contract, there is no opportunity for a creditor of the obligee to dispute its force in a court of law,

(*c*)But where he, from whom the estate moves, reserves apower in any manner to limit any estate or estates by his will, the whole fee-simple is in him; so that any act that he does to dispose of the estate will hinder him from executing his power, per Holt C. J. in Bath v. Montague's case; vid. 3 Chan. Ca. 100. and if he do no act and make no will, the fee simple, of course, descends through him.

(1) Prec. in Chan. 17. 1 Atk. 293.

(*a*) There is a case in Barnardiston, wherein it was said that the court was of opinion that a bond given by the eldest son, in pursuance of a promise made by him to his father a little before his death, to the executor, by way of provision for his younger brothers and sisters, cannot be called a voluntary bond. Barnard. 397. Eales v. Gee.

for until it has passed by regular litigation *in rem judicatam*, there is no proper subject of contest between the opposite
479 claimants, at least during the ‖life of the obligor. When the voluntary obligee is prepared to grasp the property by his execution, he is then in a predicament to dispute, or to have his claim disputed by a creditor of his obligor, and the subject of an action between them may rise out of their contending executions, to decide their pretensions upon the foot of fraud within the statute of Elizabeth.*

In actions against executors, the question of fraud within the statute 13 Eliz. upon voluntary and collusive obligations, is sooner matured; for as the executor may in some cases plead an outstanding bond in answer to actions upon the debts of
480 his testator, *(b)* an ‖occasion is then afforded to the *bona fide* creditor to controvert the verity and honesty of the contract on which the pretended obligation was grounded. But the contending claims of creditors upon voluntary and valuable debts and obligations, as they are generally implicated with matters of discovery and account, are, as before remarked; usually agitated in courts of equity, where a rule very favorable to justice is tenaciously observed of postponing all voluntary instruments, however binding in their nature, to debts arising upon honest and valuable considerations. The case of *Loeffes* v. *Lewin et al.*, (2) is one of the strongest in the books to shew the preference which courts of equity give to the stregth of the

(b) In Philips v. Echard, Cro. Jac. 8. 35. where an executor pleaded a bond outstanding against his testator, beyond which he had not assets, and omitted to say that it was for a true and just debt, the plea was holden good without such an averment, for it was said it should be intended that it was *pro vera et justo debito* until the contrary was shewn. But in several cases the omission of the averment above-mentioned has been holden a sufficient ground for a special demurrer; vid. 9 Rep. 109. Cro. Jac. 182. 625. But it should seem that the addition or omission of this averment cannot substantially affect the case, though perhaps the form of the replication may in some measure depend upon it; vid. 1 Brownl. 50.

(2) Prec. in Chan. 370. Gilb. Eq. Rep. 32. 2 Eq. Abr. 256.

* A voluntary bond or a bond given in consideration of a past cohabitation will be set aside or postponed to creditors. Turner v. Vaughan, 2 Wils. 339.

actual consideration above that which the obligatory form of an instrument supplies; the circumstances of which case, as far as regards the present question, were briefly as follows: A man, upon the marriage of his wife's daughter, to whom he was indebted, but not to the amount of the portion expected by the intended husband, made a verbal promise to the husband to pay him four thousand pounds, ‖and paid him all but fifteen hundred 481
pounds, and some time afterwards executed a bond for payment of the fifteen hundred pounds, which he shewed, together with his will, to the husband, to whom, however, he did not deliver it, but kept it by him until his death. It was afterwards found with his will. His creditors upon simple contract took out administration, and the husband becoming a bankrupt, *his* creditors exhibited their bill to have the benefit of the bond: but Lord Chancellor Harcourt decreed, that this bond was to be looked upon as a voluntary contract, being not made in pursuance of any agreement in writing on the marriage, *(c)* nor put into the power of the husband, and that, therefore, it was to be regarded as fraudulent and void as against creditors even upon simple contract.

‖ If this case had wholly rested upon the circumstance of 482
the want of validity in the promise which was made upon the marriage, (as being only by parol and void within the statute of frauds,) it would be carrying the exigency of a valuable consideration to a rigorous extent in equity, and beyond the scrupu-

(c) It seems that courts of equity will not compel execution of a *parol* promise made *after* marriage, in pursuance and confirmation of a *parol* engagement entered into *before* marriage, even as against the party himself or those voluntarily claiming under him, unless positive fraud and circumvention can be established in proof; vid. Montacute v. Maxwell, 1 P. Wms. 618. But in the same case reported in 1 Str. 236. it was said by Lord Ch. J. Parker upon the amended proceedings, that the case was very much altered from what it was at first, when it stood *purely* upon the *parol* promise, since it appeared that there was, in truth, a promise in *writing after* marriage grounded upon the *parol* promise before. That it had been frequently determined that a *parol* promise *on* marriage was a sufficient consideration to support a settlement after marriage; so was it a sufficient consideration to establish a *promise* in *writing* after marriage. In Brownsmith v. Gilborn, 2 Str. 738. the persons directing the settlement after the marriage had neither of them made the parol promise before the marriage.

losity of the courts of common law: for we have seen in the case of *Lavender* v. *Blackstone* (3) so often before cited, that a promise by an infant, though performance thereof is not compellable at law, is held to be a consideration for a subsequent settlement sufficient to uphold it against creditors or pucha-
483 sers: and by a ||subsequent case (4) reported also by Levinz it appears, that where, the wife having a real estate, and the husband being in debt, he promised her, that if she would join with him in the sale of her land, and permit him to receive the money for the use of his trade, he would leave her £400 at his death: this promise, though not binding, was held to be consideration enough, to support an obligation made six months afterwards to a stranger, conditioned to pay his wife £300 after his death. And, by the direction of Hale, Ch. J. the jury found the obligation not fraudulent against creditors. The reader will recollect the case of *Dundas* v. *Dutens*, (5) cited in a former part of this essay, wherein the statute of frauds being insisted upon as vacating a parol agreement before marriage, so as to destroy the valuable foundation for the settlement made after marriage, pursuant to such agreement, the Lord Chancellor Thurlow would not allow the objection to prevail. We observe, however, that the invalidity of the engagement before marriage arising from the want of a written instrument was not the
484 *single* ground of the decision of the above-mentioned ||case of *Loeffes* v. *Lewin*, but that the non-delivery of the deed made after marriage was among the reasons of the decree, and, perhaps, the most prevailing; for this has always been regarded in equity as a leading feature of fraud, and, if not quite enough of itself to vitiate a transaction in the consideration of the court, yet as lending great strength to slight argumentative circumstances.

Thus in the case of *Ward* v. *Lant*, (6) where a father executed a voluntary bond to one of his daughters, without any condition and payable immediately, but always kept in by him, and some proof also appeared of its having been given merely to screen himself from taxes; the bond was *set aside* even against *devisees*.

(3) 2 Lev. 247. (4) Clerk v. Nettleship, 2 Lev. 248. (1) 1 Ves. jr. 196.

(6) Prec. in Chan. 182.

How far the force of the two ingredients in the case of *Loeffes* v. *Lewin* will justify the decree upon the principles of other cases, the reader may determine for himself, after carefully distinguishing between the cumulative force of circumstances that press towards the same conclusion, as in the case of *Ward* v. *Lant*, and the diverging inferences from || two unconnected facts 485 that, without fortifying each other, agree only in their common tendency to invalidate the instrument.

We are to observe, also, that though in *Ward* v. *Lant*, the retention of the bond in the hands of the obligor, when co-operating with other testimony, induced the court to set aside the instrument as against devisees, yet that in other cases, where it has occurred as the single objection, it has not given preponderancy to the claims of other volunteers claiming under subsequent instruments; (7) and that though the bond, in the case of *Boughton* v. *Boughton*, where it was kept in the hands of the obligor, was declared to be bad as against creditors, if any such had disputed it, yet that, in such case, being at the same time voluntary, it would, without adverting to the fact of retention, have been clearly unavailing as against all persons claiming upon *valuable* consideration.

Thus it seems to be clear that voluntary bonds will take place before legacies, and are not to be disputed by executors or administrators, unless some creditor will || thereby be deprived 486 of his debt; and in the before-mentioned case of *Boughton* v. *Boughton*, we find the court of Chancery carrying its respect for these solemn securities in favor of volunteers so far, as even where the bond had never been delivered to the obligee, to set it up against the subsequent voluntary dispositions of the obligor(*d*). And where a voluntary bond has been given up to be cancelled, a court of Equity has compelled execution, if no creditor in the case, and where there was a meritorious consideration to support

(7) 1 Atk. 625. Boughton v. Boughton.

(*d*) It is true, that in *Naldred* v. *Githam*, 1 P. Wms. 577, where an old woman had executed a voluntary deed, which she kept by her, and her nephew had *surreptitiously* gotten a copy of a deed, the original of which the lady afterwards destroyed; Lord Macclesfield reversed the decree of the Master of the Rolls, who had declared in favor of the copy; but that case stands upon its particular circumstances.

the instrument; a strong instance of which is furnished by the case of *Beard* v. *Nutthall* (8), where a voluntary bond after marriage having been entered into by a husband, to settle a jointure upon his wife, and the jointure being settled and the
487 bond given up to be ||cancelled, and the wife, after the husband's death, being evicted of the land settled, the court decreed the jointure to be made good out of the husband's personal estate. The various cases (9) of account and satisfaction decreed to plaintiffs in the court of Chancery, on bonds given as *præmia pudicitiæ* are examples of the same kind. The court, too, has sometimes regarded bonds as standing *wholly* upon *good* consideration, though the sum secured has been greater than the sum given; for it was said by Lord Harkwicke, in the case of *Blount* v. *Doughty*, (10) that the court would not measure the consideration of debts of *that* kind, by exact rules of proportion of value, but if such a contract was fairly entered into, without any circumstance of fraud, it must be looked upon as made upon a good consideration. To be sure, added his Lordship, where there is any symptom of fraud, or intent to cover something from creditors, the court would not suffer it to prevail. It seems, too, that, though the *identical* consideration of a bond fail, yet if the obligee
488 has the || full benefit of his agreement, the court of Chancery will support the obligation. (11) But it has been laid down as the rule of that court, that where a bond is claimed in consideration of money lent, and the obligee fails in proving the actual consideration alleged, he shall not be allowed afterwards to set up the instrument as a *voluntary* bond upon *meritorious* consideration. (12)

(8) 1 Vern. 427. (9) Vid. Eq. Abr. 87. (10) 3 Atk. 484.

(11) Vid. Eq. Abr. 85. and Chan. Rep. 49. (12) 1 Atk. 294.

SECTION IX.

|| With regard to judgments by confession, where they are given by way of collateral security, it is clear, upon principle, that they can stand in no higher consideration than bonds, as their validity within these statutes.* If the bond be voluntary a judgment confessed upon it will likewise be voluntary. Thus in the case of *Fairebeard* (1) v. *Bowers*, where a freeman of London, having three bastard children by J. F. entered into a bond, and afterwards confessed a judgment to her for £1,000 defeasanced

(1) Prec. in Chan. 172. Vern. 202.

*A judgment at law obtained by fraud may be set aside in Chancery, Collin v. Easton, 2 Missouri R. 145; Wallington v. Howley et al. 1 Desaus. C. R. 167.

A judgment signed in term time relates back to the first day of the term; and a judgment signed in vacation relates to the first day of the preceeding term. And therefore the court will not set aside a judgment signed after the death of the defendant when by such relation, it becomes a judgment of the preceeding term when the defendant was alive. Fearne v. Atkinson, Willes, 427; Savill v. Wittshire, Do. 428. n. a. And in this respect there is no difference between an adverse judgment and a judgment signed under a warrant of attorney, Hall v. Moss. Do. 228 n. a. A judgment entered before an extent is sued out, shall be preferred, Stacy v. Halse 2. Doug. 411.

Where two judgments are signed on the same day the priority of one cannot be averred, Porchester v. Petrie, 1. T. R. 118. Bebee et al. v. Bank of New York in error, 1 J. Rep. 529. Waterman v. Haskins, 11 J. R. 228. Adams v. Dyer, 8. J. R. 347. 18 Wend. 628.

A confession of judgment ought to be for a certain and specified sum. Nichols v. Hewitt, 4 J. R. 423. A confession of judgment for the amount of an award before it is published, is bad, Do.

A warrant of attorney by an infant to confess judgment is void: and a judgment entered by virtue of it will be set aside on motion. Bennett v. Davis, 6 Cow. 393. The supreme court have an equitable jurisdiction over judgments entered up by confession on bonds and warrants of attorney; and when the warrant of attorney, judgment and execution are fraudulent as respects creditors, the court will protect the creditors from its operation, upon summary application for that purpose, when they have completed their title at law. Frasier v. Frasier, 9 J. R. 60; Wintingam v. Wintingam, 20 J. R. 296; Marsh v. Lawrence, 4 Cow. 461; Smith et al. v. Storne, 1 Wend. 37; Lawless v. Hackett, 16 J. R. 149.

for payment of £500 within six months after his death, to be divided equally among the children; it was decreed, that the judgment, being voluntary, should not prevail against debts by simple contract, nor against the claim of the widow for her customary part.

And in a case (2) before Holt, C. J. where goods having
490 been taken in execution, which were in the ‖ possession of the plaintiff under a bill of sale from G. the plaintiff brought his action, and the defendant insisted, that the bill of sale was fraudulent against him, he being a creditor by judgment, it was said by the Chief Justice, that if the judgment was upon a *point tried*, the consideration for it needed not to be proved, but it should be intended good; but if it were a judgment by confession, it ought to be proved to have been for a just debt, otherwise it should not overthrow the sale, even though the sale were fraudulent, for it is good against all but creditors for a just debt, *bona fide* due.

But although a judgment be confessed upon a just debt, it may yet be fraudulent; for though the debt be *bona fide* due, the judgment *quoad* other creditors may be *mala fide confessed*, *i. e.* may be confessed with intent to delay, hinder, or defraud others of *their* just and lawful actions, and such intent is to be collected from the circumstances of each case. But it should always
491 be remembered that under the statute 13 Eliz. ‖ c. 5. the *mere* preference of one creditor to another is not a ground to impeach the transaction, (*a*) although in certain cases a more rigorous rule in respect to these preferences has been gene-
492 rated by the policy ‖ of the bankrupt laws. (*b*) Though a

(2) Holt, 327. Sanders v.—

(*a*) Vid. the cases of Holbird v. Anderson, 5 T. R. 235. and Estwick v. Caillaud, ibid. 420. and vid. Jones 62. Recovery with legal cause, though with consent, not covinous.

(*b*) It seems that every fraudulent conveyance by deed, within these statutes 13 and 27 Eliz. is an act of bankruptcy, vid. Hassel v. Simpson, Co. B. L. 85. and consequently fraudulent against the assignees, but the converse of this position will not hold. A man, variously indebted, may convey all his property to a particular creditor whose debts covers their value, without bringing himself within the stat. 13 El. c. 5. unless the transaction be distinguished by other indications of fraud; but such conveyance by a trader is a fraud upon

man be sued to judgment and execution by one of his creditors it || has been holden that he may yet give the preference to anoth-

the general policy and design of the bankrupt laws, and will therefore be an act of bankruptcy, and fraudulent against the assignees. 1 Burr. 407. 477. Dougl. 282.

And an assignment of all a trader's effects for the benefit of all his creditors has been holden an act of bankruptcy, and consequently fraudulent as against the assignees, unless *all* assent to the deed, though the persons executing the deed can never themselves set it up as an act of bankruptcy. Vid. Co. B. L. 86. But such acts are not *necessarily* fraudulent within the statute 13 Eliz. c. 5. They are fraudulent within the bankrupt laws from an inferred contemplation of bankruptcy in the conveyor, which principle of construction will extend to a conveyance of only *part* of a trader's effects to a fair creditor. 2. P. Wms. 427. 13 El. c. 7. s. 12.

The acts constitutive of the fraud within the bankrupt laws, whereon a commission can be grounded, are declared and defined by positive laws, and cannot be taken by inference; therefore, although many fraudulent transactions within the statutes of fraudulent conveyances are not of themselves acts of bankruptcy, yet it may be said that all acts of a debtor which are fraudulent within the statute 13 Eliz. c. 5. are void as against assignees, under the statutes of bankrupts. And the true reason, as appears from the cases, why many transactions are fraudulent within the statutes of bankruptcy, which are not so within the stat. 13 Eliz. c. 5. of fraudulent conveyances, is because whatever is done in *prospect* of bankruptcy, and has a plain tendency to obviate its consequences, is done with premeditated opposition to a statute law. The statutes of bankruptcy anxiously provide for the *equality* of creditors; a preference, therefore, given to a creditor in immediate *contemplation* of bankruptcy, *merely as* a concerted preference, is fraudulent within these statutes, vid. Rust v. Cooper, Cowp. 629. But that such preference is not *of itself* fraudulent within the 13 Eliz. c. 5. appears from the case of Estwick v. Caillaud, 5 T. R. 420. It seems upon the whole, that we may safely say, that every fraudulent conveyance or act within the stat. 13 Eliz. c. 5. is fraudulent within the statutes of bankruptcy, and every fraudulent conveyance by *deed*, within the 13 Eliz. c. 5. is of itself an act of bankruptcy.

It has before been observed, that a voluntary conveyance by a man, not indebted, for the benefit of his children, or by way of general family settlement, after marriage, is not fraudulent as against subsequent creditors, within the statute 13 Eliz. But by the express letter of the stat. 1 Jac. c. 15. § 5. such a conveyance is fraudulent as against assignees under a commission of bankruptcy. Vid. Walker v. Burrows, 1 Atk. 94. And it has been before observed, that if a man indebted, takes an *original* conveyance to any of his children, under a purchase, in their names, such estate is not subject to his debts, within the 13 Eliz. c. 5. but that, by an especial clause, such original conveyance without consideration, whether the purchaser be indebted or not,

er by voluntarily confessing judgment to him, if there are no distinctive badges of fraud to vitiate || the transaction; *(c)* and the *inferiority of the rank of the debt* upon which such judgment is voluntarily confessed is not, of itself, a badge of fraud. But it is plain that, after the debtor's decease, such voluntary preference by the executors can only be shewn among creditors in *equal degree*, and an executor may not voluntarily confess a judgment, to simple contract creditors, if he has notice of a specialty demand, (3) neither, as it seems, if a suit has been commenced, whether in a court of law or equity *(d)* can an executor make a *voluntary payment* of *any* debt.

SECTION X.

495 ||An important and curious part of the present subject is the nature and effect of that sort of consideration which springs out of a transaction subsequent to a voluntary and fraudulent conveyance and restores such conveyance to its legal validity, under the statute 27 Eliz. c. 4. as an authentic channel,

is brought within the statute 1 Jac. c. 15. It should be observed, however, that where a man, not indebted, and not a trader at the time, makes a voluntary settlement on a child, and afterwards *becomes* a trader and a bankrupt, this settlement is not liable to the bankruptcy. Vid. Lilly v. Osborn, 3 P. Wms. 298. Though it seems by the late case of Fryer v. Flood, 1 Bro. C. R. 160. that *both* these circumstances must concur to protect the transaction, and that if the party be a trader at the time of the settlement, his solvency will not save him from the operation of the statute 1 Jac. 1 c. 16.

(c) If an executor keeps a judgment on foot by fraud, it is bad at the *common law*. Vid. Peachy v. Spelman, Vent. 329.

(3) 1 T. R. 690. Sawyer v. Mercer.

(d) Vid. 3 P. Wms. 401. note F. and Cas. Temp. Talb. 218, Morrice v. Bank of England, affirmed on an appeal to the house of Lords. Vid. Bro. P. C. 287. And see in Smith v. Styles, 2 Atk. 387. Lord Hardwicke's confirmation of the doctrine that a decree of the court of chancery is equal to a judgment at law, and consequently that *that* which is first obtained ought to be first satisfied.

through which the title may be conveyed. Which doctrine is thus explained by the Bench in the case of *Prodgers* v. *Langham.* (1) Although a deed be fraudulent in its creation and void *(a)* as against a purchaser, yet it may become good by matter *ex post facto ;** as if a man makes a feoffment by covin, and the feoffee makes a feoffment over for valuable consideration, and then the first feoffor enters and makes a feoffment upon valuable consideration, the ‖feoffee of the first feoffee shall 496 retain the land, and not the feoffee of the first feoffor; for although the estate of the first feoffee was in its *creation* covinous, and so void as against a valuable purchaser from the first feoffor, yet when he enfeoffs another upon valuable consideration, the feoffment shall be preferred to a *subsequent* feoffment by the first feoffor.

The same was maintained by Lord Chief Justice Holt in *Andrew Newport's* case, (2) where, on an ejectment brought by the assignee of the mortgagee, it was objected, that it did not appear that any money was paid upon the original mortgage; for which reason it was contended, that it must be considered as fraudulent, and being fraudulent in its creation, though the assignee paid a valuable consideration, yet that the fraud still adhered to and vitiated the transaction as against the defendant, who was a subsequent purchaser under the original mortgagor for a valuable consideration. But it was resolved that the first mortgage was good between the parties, and *that* being so, when

(1) 1 Sid. 133. 1 Str. 243.

(a) The expression in the original is *voidable by a purchaser*, which seems not accurate.

(2) Skinner's Rep. 423. The same case is reported in 3 Lev. 387. by the name of Smartle v. Williams.

* A deed, though it be fraudulent in its creation, yet by matter *ex post facto* may become good; as if one make a fraudulent feoffment, and the feoffee makes a feoffment to another for a valuable consideration and afterwards the first feoffor also for a valuable consideration, makes a second feoffment, the feoffee of the feoffor, shall hold against the second feoffment of the first feoffor. Sid. 134; Pr. Ch. 377; E. I. Co. v. Clavel, Gilb. Eq. R. 37; 2 Eq. Ca. Abr. 52. pl. 6; P. C. 305; 2 Eq.Ca. Abr. 481, pl. 13; Moore, 605; 3 Co. 826; 2 J. Ch. R. 48; 1 J. Ch. R. 261; 15 Johns. R. 571; 12 Johns. R. 536.

‖ the first mortgagee assigned for valuable consideration, it was the same as if the first mortgage had been made upon a valuable consideration, for his assignee stood in his place, and having paid a consideration of value, was within the proviso of the statute 27 Eliz. c. 4. So, in the case of *Wilson* v. *Wormal*, it was said by Chief Justice Cook, that if lessee for years assign over his term by fraud to defeat an execution and the assignee assign over the premises to another *bona fide*, they are not liable to execution in the hands of the second assignee.(3)

And it is to be observed, that the valuable consideration, whenever it accrues, entirely obliterates the fraud, so that it can never again, in any shape affect the transaction. Thus a purchaser for value from a voluntary grantee, has a good title against all subsequent purchasers for valuable consideration from the original grantor, and the voluntary grantee of a valuable
498 purchaser shall avoid a former voluntary conveyance ‖by his grantor's vendor, for he supports himself by the strength of his grantor's title. In the case of *Goodtitle* v. *Moses*, (4) the title of the valuable purchaser from the volunteers was too late in its commencement: it was anticipated *pro tanto* by the title of the lessee, who was a purchaser *quoad* his lease for valuable consideration from the voluntary grantor, before the title by purchase from the voluntary grantees accrued to the plaintiff.

But if a man makes a voluntary conveyance to A. and afterwards conveys the same estate without consideration to B. and the second grantee conveys to a purchaser for valuable consideration, it is plain that the title of the first grantee is good against the purchaser from the second: for the first voluntary conveyance was good between the parties, and thereby the estate passed in law to the voluntary grantee, so that the second grantee had no estate to convey to the purchaser; for the second attempt to convey the estate without valuable consideration, was wholly abortive.*

(3) Godb. 161. (4) 2 Black. 1019.

* A sale made by a fraudulent purchaser of lands, to another, *bona fide*, for a valuable consideration and without notice, is purged of the fraud. Gore v. Brazer, 3 Mas. 541; Inhabitants of Worcester v. Eaton, 11 Mass. 368; Hills v. Elliott, 12 Mass. 26; Dexter v. Harris, 2 Mason, 531; Bean v. Smith, 2 do. 252; Cathcart v. Robinson, 5 Peters', 268.

And the result would obviously be the same, if the first ‖grant were a mere bounty to a stranger to the blood 499 of a grantor, and the second were made upon the consideration of natural affection, and with the laudable design of providing for a family: in such a case a purchaser from the first grantee would prevail against the second. This (5) was decided in a case sent out of chancery for the opinion of the Judges, where a man seised in fee, having made a voluntary conveyance with power of revocation, afterwards, without effectually revoking the first conveyance, covenanted to stand seised to the use of his nephew for his advancement in life, who sold the estate to a purchaser for valuable consideration; and the Judges were of opinion that the purchaser had no title. This case has before been cited in a part of this treatise, (6) wherein the qualifications of the purchaser, to entitle him to the patronage of the statute, were under discussion; and the question is evidently in substance the same whether we are considering the title of the second grantee, or of the vendee under him.

‖ Levinz, in his report of *Andrew Newport's* case by 500 the name of *Smartle* v. *Williams*, (7) subjoins a query of his own, and adds, "that the contrary had been holden;" and by a note in the margin of that reporter we are referred to Sir Thomas Raymond's Reports, (8) for an example of a resolution opposed to this doctrine of considerations by matter *ex post facto*. The name of the case, corresponding with this reference, is *Eden* v. *Chalkall*, which upon examination, will be found to establish nothing more than the above cited case of *Dame Burg*.

In this case of *Lady Burg* we observe, that the person making the successive voluntary grants was a mere trustee; we must suppose him therefore, to make the first grant without the privity and consent of his *cestui que* trust; for had that been the case, he was incompetent even for a *valuable* consideration to defeat his former voluntary conveyance, for he would, in such case, be *virtually* a different person from the ‖first 501 conveyor. We observe too, that the great question in the

(5) Dame Burg's case, Moore 602.

(6) Vid. supra, 383. (7) 3 Lev. 388. (8) Sir Tho. Raym. 25.

case was whether the conveyance to the nephew, being in consideration of blood and affection was capable of defeating a former voluntary grant; for if the consideration *had* been effectual, the conveyance without notice of the trust would have carried the estate discharged of the trust in equity.—Nothing, however, can have this effect in equity but a *valuable consideration*, and this was *not* a valuable consideration; so that the first voluntary grantees retained the legal estate subject to the trust for *Lady Burg*, the plaintiff in equity. Had the second conveyance by the trustee been supported by a valuable consideration, the interest of the *cestui que* trust would have been defeated, notwithstanding the purchaser from the person to whom the second conveyance was made (9) had notice of the original trust, for those rules of derivative security, by a sort of substitution of title, which, with respect to legal estates, has been adverted to a few pages above, as affording protection to voluntary claimants, are applicable in *equity* to volunteers
502 and ||persons coming in with notice. Thus if a man purchase with notice of articles from a purchaser without notice, he is protected in equity by the title of his immediate vendor, and is safe under the shelter of another's innocence. And the same accessory consideration arising from matter *ex post facto* will legitimate in a court of equity a corrupt antecedent claim for the sake of a succeeding innocent purchaser deriving through it. As, where a purchaser, *with* notice of precedent articles, sells to a purchaser for valuable consideration *without* notice, the second sale will be good in equity. Though, perhaps, the second vendor may be liable to make satisfaction to the covenantee in the articles. And a volunteer claiming under one who has purchased *bona fide* after articles entered into by the vendor to another is protected by the sufficiency of title in his own immediate grantor.

Every consideration which will support the claim of a purchaser against a prior voluntary conveyance by his vendor,
503 will also bring him within the proviso || of the statute where he takes his title from the voluntarygrantee. A subsequent *settlement* therefore, establishes and ratifies an antecedent voluntary

(9) See the case, Moore 602.

conveyance, where the interest is drawn out of the grantee upon the consideration of marriage; and every party to the deed, within the scope and purpose of the settlement, is certainly a purchaser for valuable consideration to this effect. But the cases have extended the benefit of this rule to an extreme latitude in favor of *marriage*, so as to embrace within its protection, not merely a purchaser by marriage, who claims under an *actual settlement* of the property which was the subject of a former voluntary conveyance to the settler, but even such a claim by virtue of a constructive consideration, founded only upon *probable inducement and expectation*; for where long possession of, or a notorious and undisputed title to, an estate under a voluntary conveyance has given such credit to a party with the friends of his intended wife, as apparently to draw from them their consent to the marriage, the union which has afterwards taken place has been regarded as founding ‖itself upon these appearances, and as 504
being a sort of implied purchase of an interest in property, which becomes implicated in the present support of the new establishment, and in the rising hope of the future family. An early authority to this effect is the case of *Progers* v. *Langham*, (10) reported in Siderfin, which was thus:

A. being seised in fee of lands in the county of N. made a lease of his lands to B. and C. in trust for his only daughter and heir for twenty-one years, to the intent that the profits might be applied to her maintenance until her marriage, and if she married Poulton, or any other, during the life of B. with his consent and liking, then in trust for her during the residue of the term; the daughter did not marry Poulton but married the plaintiff, whom A. disapproved of at first but he became afterward reconciled to the match, and lived and died with the husband and wife. The court held in this case, 1. That the conveyance to the daughter was a voluntary conveyance, and would have been void ‖as against the defendant, a subsequent purchaser for valu- 505
able consideration, within the statute of fraudulent conveyances, if the marriage had not intervened. But, 2. That although the conveyance was void in its creation as to purchasers, yet when the marriage took effect, the first settlement remained

(10) 1 Sid. 133.

no longer voluntary, as it was in its creation, but became supported by a valuable consideration, and by consequence, unimpeachable; inasmuch as the marriage was an advancement of the daughter, and he who married her was *induced thereto by the prospect of this provision.* And, 3. They resolved, that B. might agree to the marriage at any time during his life, and though he at first disapproved, yet his subsequent agreement operated by relation to the time of the marriage.

Kirk v. *Clark* (11), a remarkable case of the same order was determined in Chancery by Lord Chancellor Cowper; and was thus in effect: Sir N. C. tenant for life of copyhold lands, 506 with the remainder to his || wife for life, the reversion to himself in fee, made a surrender of the reversion to his eldest son in tail, the remainder to his own right heirs; which surrender was made to his son, with intent only to lessen the fine he would have paid in case the reversion had come to him by descent from his father. Afterwards, upon a treaty of marriage between the son and a young lady, who was to have £2,000 for her portion, her friends understanding that the father had a leasehold estate besides the copyhold, proposed to have both settled, but told him that they relied chiefly upon the copyhold as the proper equivalent for her fortune; upon which Sir N. C. told them that he *had* settled that *already* on his son by surrender; and thereupon an agreement was made and reduced into writing, for settling the leasehold estate upon the lady and the issue of the marriage, reciting the intended marriage and portion; and that in consideration thereof the leasehold was agreed to be settled in the manner therein mentioned. A settlement was accordingly made some time afterwards. The wife of Sir N. C. 507 being dead, and he being in ||treaty for another marriage, articles were entered into for a settlement upon the second wife, and amongst other things Sir N. C. covenanted to settle the copyhold lands upon her for a jointure, and a bill was afterwards brought by her and her trustees, (the marriage having taken place,) to compel a specific performance of those articles.

The argument on which the plaintiff's counsel relied, was, that the settlement on the son was purely voluntary, having been

(11) 1 Prec. in Chan. 275.

made long before any treaty of marriage had begun, and therefore fraudulent and void against a purchaser for valuable consideration, without notice *(b,)* as the plaintiff, in that case was ‖by her *marriage.* And the rather because the agreement 508 in writing comprized only the leasehold estate, the copyhold estate having been settled long before, and at a time when there was no prospect of the son's marrying. It was argued on the other side, that this ought not to be looked upon as a voluntary and fraudulent settlement as against the plaintiff, because it was the chief inducement that prevailed with the friends of the son's wife, to consent to the marriage, and to bestow upon her the portion which she brought with her; and that if they had not been assured that the copyhold was already settled upon the son they would have insisted upon a settlement or refused the portion. The Lord Chancellor decreed the surrender to the son to be good, declaring, that though it was at first voluntary, yet that, upon the treaty of marriage, it being regarded as the *principal inducement thereto,* it *become valuable,* and ought to he considered as if it were but *then* surrendered to the son. He added; that it was not necessary to insert it in the article, it being an estate of another nature, and to pass in ‖another manner; 509 and being already settled, it was sufficient in the articles, to provide for the settlement of what they *further* intended to secure on that marriage, without taking notice of what was *already* settled to their satisfaction.

In the case of the *East India Company* v. *Clavel,* (12) the decree of Lord Chancellor Harcourt was grounded on the same sort of reasoning. The case has been before stated for another purpose; but for the sake of clearness it may be as well shortly

(12) Prec. in Chan. 377.

(b) The integrity of a purchaser who claims against a voluntary settlement in a court of Equity, has before been considered; and it has been observed, that, though in such cases notice of the former voluntary conveyance would not prejudice the case of a purchaser who claimed under an executed conveyance at law, yet that courts of Equity will not lend their discretionary aid to force the specific execution of agreements to any but purchasers for valuable consideration and *without notice;* for these are universal tests of integrity in those courts, and where the conveyance is unexecuted, the purchaser's case does not fall within the specific remedy upon the statute.

to restate it here. A. agreed with the East India Company to go as president to Bengal, and entered into a bond of £2,000 penalty for performance of articles. But before he set out, he made a settlement of his estate, and, among other things, he declared the trust of a term of 1000 years to be for raising £5,000 as a portion for his daughter, who afterwards married J. S. whose fortune was £700 *per annum*; J. S. was, before marriage, advised by counsel, that the portion was sufficiently secured, and, af-
510 terwards, on the death of his wife, had || in compliance with her request, expended £400 on her funeral. But no settlement had been made upon her by J. S. A. embezzled the goods and stock of the company to the value of £26,000 and, consequently, had forfeited his articles and bond, and made himself liable to satisfy the company that sum. They, accordingly, brought their bill against J. S. and the trustees, to have an account of the real and personal estate of A. and praying that the same might, in the first place, be subjected to their demand. But it was urged, with success, by the counsel for the defendant, that J. S. though he made no settlement, had a very good estate, of which his wife would have been dowable if she had lived, and that he had expended £400 upon her funeral in compliance with her request. That, *if this settlement were voluntary in its creation, yet, being the motive and inducement to J. S. to marry her, it had now become valuable*; of which opinion was the Lord Chancellor.

Doe v. *Routledge* (13) may, perhaps, not improperly be
511 referred to this order of cases, though it contained || *other* circumstances affecting the credit of the transaction on the part of the purchaser. The voluntary surrender in that case was made in 1763, and the defendant under that surrender was notoriously entitled to the estate in remainder in 1767, when he paid his addresses to H. at which time a copy of the surrender was shewn by the defendant to the lady and her father, who *thereupon* gave their consent to the marriage, which soon afterwards took place; the counsel for the defendant did not forget to insist, that if the settlement was voluntary and void at the commencement, as against a subsequent purchaser, it was made good

(13) Cowp. 705.

in the sequel by becoming the principal motive and inducement with the friends of the wife, to consent to the marriage. The judgment of the court was for the defendant; but disavowed for its basis any technical construction of the statute, which it resolved into a mere promulgation of the rules of the common law for the suppression and avoidance of fraudulent conveyances. Whether this was doing justice to the purview of the statute, or was too shallow a sounding of || its depth and meaning, is for the 512 student's inquiry, for the assistance of which he is referred to the preliminary observation with which this essay is introduced.

It was observed by the Chief Justice that the nephew *gained credit* by the *notoriety* of his title to the estate, the surrender to him being on the rolls of the court, and accessible to the whole country, and that the inducement of the lady's consent, and that of her friends as a *consequence* of that credit, had its weight on his judgment; but he added, that though what happened previously to the marriage (meaning, it may be supposed, the declarations of the nephew and his production of the documents to the intended wife and her father, while the marriage was in agitation) could not be coupled *with the first transaction*, (*d*) because the knowledge of it could not be brought home to William or || Hugh Watson, (*e*) yet that it served to shew what in gen- 513 eral may be supposed to happen from an act of that kind.

By this reasoning his Lordship seemed to think, that where a marriage is subsequently induced by the visible title of the voluntary alienee, it engrafts no consideration upon the original transaction, unless it appear, that it was an event in prospect at the time of the voluntary conveyance: But the cases above produced do not seem to turn upon a principle implicating any supposition of such view in the grantor to a particular mar-

(*d*) It is conceived that this is the sense of the passage.

(*e*) It is not clear how a knowledge of the transaction by Hugh Watson, who was the pretended purchaser, could have prejudiced his case, unless indeed, having at that time a promise of a conveyance from the uncle, he had himself stood by and persauded the lady or her friends to consent to the match; and such a conduct, (though a *subsequent* knowledge of the transaction, according to Gooch's case, would not have disqualified him under the statute 27 Eliz.) would certainly have attached a direct fraud upon his case, so as to throw him out of the protection of the statute.

riage for which the estate conveyed is to become ‖a provision; but rather rely upon the doctrine that a voluntary conveyance being good against all but creditors or subsequent purchasers, and, where they are by way of advancement or provision for children, being good against *subsequent* creditors, and entitled to a favorable distinction both at law and in equity, are in a predicament to be confirmed and fastened in the grantee, by becoming a prevalent motive with third persons to consent to a marriage, which is the most *valuable* and *weighty* of all *considerations*. It would indeed, in most cases, be a violent strain, to connect these considerations arising by matter *ex post facto* with the original reasons of the first voluntary conveyance; but the truth seems to be, that, as the voluntary grantee has a *good estate* till it is impeached by a subsequent purchaser from the original grantor, if, before such subsequent purchaser from the grantor appear, the voluntary grantee engages in a *bona fide* transaction with a third person, who either expressly purchases the estate by

an actual settlement, or by a marriage with the grantee
515 induced by a just expectation of support ‖and preferment,

acquires a general interest in the property, it seems that either the voluntary conveyance is confirmed as the medium of the new title, or the interest under it is fixed in the grantee by the accession of a new meritorious claim. And this species of transaction seems to have been considered in *Prodgers* v. *Langham*, before referred to, as within the principle of the case there put by way of exemplification, viz. that if a man makes a feoffment by covin, and afterwards the feeoffee makes a feoffment on valuable consideration, and then the first feoffor enters and makes a feoffment for valuable consideration; the feoffee of the feoffee shall hold the land against the feoffee of the first feoffor; for though the estate of the first feoffee was in its creation covinous and fraudulent, yet when he enfeoffs a third person upon valuable consideration, such feoffment shall be preferred to the feoffment subsequently made by the original feoffor.

This rule in *Prodges* v. *Langham* was correspondent to
516 the decisions of the courts upon the statute of ‖Marlbridge,

52 H. 3. long before these statutes of Elizabeth; according to which decisions, if a father made a feoffment to his eldest son to defraud the king or other lord of his wardship, primer seisin,

or other fruits of the feudal tenure, the lord in the language of the books, had a possibility to have the ward, if the father died leaving his heir within age; but if the feoffee made a feoffment over *bona fide*, and afterwards the father died, the son being within age, there that possibility was destroyed. (13)

The authority of the above case of *Prodgers* v. *Langham*, covers, as it should seem, the case of a subsequent marriage contracted by the voluntary grantee, where the subject of the voluntary conveyance is *expressly* a part of the marriage settlement, for then it is *specifically* purchased by the valuable consideration of matrimony. Its authority grows weaker as we recede from this point wherein the subject of the first conveyance is *expressly* within the *terms* of the subsequent contract, and as the evidence of expectation and inducement in third persons whose interests are supported ‖by the marriage declines 517 from the positive assurance and agreement, to the more general prospect of establishment founded upon appearances.

But although the efficacy of the valuable consideration accruing by matter *ex post facto* is establtshed, upon clear authority, up to a certain extent, yet it has been always held that a transaction *good at the beginning*, cannot become *fraudulent* by matter *ex post facto* (14). The proposition is true in a *general* sense, but we must be careful to apply it only to those cases, where the transaction is not only good in *vulgar* apprehension, but is good upon the *true construction* of the statutes; for, as has been observed before, the policy of the statutes has knit together in one frame and texture of fraud, transactions distant from each other in the order of time, and compounded an evidence out of both which supersedes the necessity, in may cases, of *direct proof* of prospective contrivance. But as this particular point has been already discussed (15), little more need be said respecting it in this place; the student will find that the proposition above noticed, ‖ is referrible to those cases, where single circum- 518 stances not coupled in testimony with subsequent events by the statute, are produced as the badges of fraud, and which

(13) 33 H. 6. Andrew Woodcock's case.

(14) 2 Bulst. 225.

(15) See preliminary observations.

yield at *once*, without any inceptive connection with future acts, all the testimony they import.

Such is the nature of the evidence of covin arising from *possession* inconsistent with the express and ostensible design of a conveyance, which has always been regarded as a strong feature of fraudulent intent within these statutes of Elizabeth. Accordingly, it has been determined, (*f*) that if A. *bona fide*, and for valuable consideration mortgages his land, in which he has a term of years, to B. upon condition that if he repay the money to B. in a year afterwards, that he shall re-enter, and B. covenants with A. that he shall take the profits until that
519 time, and A. does not pay the money, ‖but B. hoping that A. will pay it at last, suffers him to continue in possession, and take the profits of it for two or three years afterwards, in the mean time judgment is obtained against A. upon his bond, and execution awarded; the lease shall not be subject to the execution, but the mortgage shall prevail against the creditor, for the possession, being consistent with the deed at the time of making it, and so not fraudulent, shall never be said to be fraudulent by matter *ex post facto*. So that in the case of *Griffin* v. *Stanhope*, (16) where it was objected that the defendant had *concealed* the lease during her husband's life, and that, therefore, it ought to be considered as fraudulent, because, if she had discovered it, persons would have been warned from purchasing; the Chief Justice answered that all actions have reference to their first original; that it would have been *better* if she had discovered that she had such a lease, but the lease, being good *at the first*, the subsequent concealment thereof should not make it fraudulent.

(*f*) Vid. Shep. Touch. 65. Lady Lambert's case; and vid. the case of Stone v. Grubham, 2 Bulst. 225. where the same reasoning appears.

(16) Cro. Jac. 455.

CHAPTER V.

SECTION I.

After this general view of the legal consequences of the *want of consideration* in settlements and conveyances, the *vitiating effect of actual* fraud, whether it be chargeable as a bare matter of fact, as where it consists in representations of what is false, or in suppressions of what is true, or arise as a conclusion of law upon facts, as where it is inferred from certain characteristic marks and indications, follows by a natural inference, since the law would otherwise be inconsistent with itself. The common law of England abhors every species of covin and collusion; but being tender of *presuming* fraud from *circumstances*, statutes have been specially framed to suit the exigencies of ‖the times, *(a)* which are as fertile in the artifices of 521 concealment as in the opportunities of deceit. It was the prevention and not the punishment of fraud in which the common law was defective, for there is no instrument or act which is not liable by the law of this country to be rendered absolutely void by clear and explicit evidence of fraudulent intention. So general, indeed, is the condemnation of all fraudulent acts by the law of England, that a fraudulent estate is said, in the masculine language of the books, to be no estate in the judgment of the law. It forfeits the protection of every statute which gives confirmation to doubtful titles, and while a disseisor has the benefit of the statutes of fines and limitations in support of his wrongful title, a title acquired by covin is indefinitely open to be disputed, and even acts, as well *judicial* as other, which of themselves are just and lawful, if infected with fraud, are in judgment of law vitious and unavailing; for the maxim is ***quod alias bonum et justum est, si per fraudem petatur, malum et injustum efficitur.**** All the partialities of the law expire under

(a) Quæ natura videntur honesta esse, temporibus sunt inhonesta. Cic. de Off. lib. 3.

* It may be laid down as a general rule, that without any express enactment of parliament or legislative body, all deceitful practices in defrauding

its antipathy to fraud. If a woman has a right of dower,
522 but ‖recovers it against the tertenant by *covin*, the recovery is of no force; though dower is a favorite of the law. (1) No remitter is produced, if estates come together by a fraudulent contrivance, and infants and feme coverts lose their privileges wherever their acts are chargeable with collusion. *(b)*

The common law carried also its remedies against deceit, where positive proof could be obtained, to great perfection. It seems that Lord Hobart was of opinion, that if a trustee sold to a purchaser for valuable consideration without notice, an action would lie against him at the common law, *(c)* and it has been said, that many suits in chancery might be saved by good

(1) Co. Litt. 35. a.

(b) See the case of Wimbish v. Tailboys, Plowd. Com. 54. and Fermor's case, 3 Rep. 78. wherein abundance of examples of the same kind will be found: and see Dyer, fo. 294.

(c) Vid. Eq. Abr. 384. D. note a. sed vid. 3 Atk. 312. the description of a trust by Lord Hardwicke, viz. where there is such a confidence between the parties that no action at law will lie.

another of his known right, by means of any artful device contrary to common honesty, are condemned by the common law, and punished according to the heiniousness of the offence. Co. Litt. 3, b; Dyer, 295; Hawkins P. C. c. 71. Fraud, covin, collusion and deceit, are often used as synonimous words, and in whatever form they appear are always odious in the eyes of the law. Lord Coke defines covin to be a secret assent, determined in the hearts of two or more, to the defrauding and prejudice of another. Coke Lit. 357. See also Bouv. L. D. p. t. As to the most remarkable statutes against fraud and imposition, see statute of Merton, or 20 H. 3, c. 5, against the lord's enfeoffing his son and heir apparent, to defeat the King of his wardship; and the statute of 4 H. 7, c. 17, to the same purpose, and the statute Gloucester, or 6 E. 1, c. 11, to secure the interest of termors against recoveries by fraud, and 21 H. 8, c. 15, which enables termors to falsify recoveries against their lessors, and West. 2 or 13 E. 1, c. 4, for securing the wife's dower against a fraudulent recovery suffered by the husband, 1 R. 2, c. 9, against fraudulent feoffments to persons unknown. 3 H. 7, c. 2, which makes deeds of gift of goods and chattels, in trust for the maker void; 32 H. 8, c. 9, against buying of pretended titles; 33 H. 8, c. 1, and 30 Geo. 2. 24, against obtaining money or goods by false tokens, (see also Rev. Stat. of Vt. ch. 95, § 14 and 15) 3 & 4 W. 3, c. 14, against fraudulent devises; 4 & 5 W. 3, c. 16, against fraudulent mortgages. And the statute 13 Eliz. c. 5, 27 Eliz. c. 4, and 29 Car. 2, c. 3, emphatically called the statute of frauds.

pleading; for if a man had bargained and sold his land at common law, and refused to make assurances accordingly, || and afterwards conveyed the lands to another who had notice of the first bargain, the first bargainee might have had an action upon the case for the deceit as well as a subpœna. (2) It is a rule, at least, as old as the year-book, 9 H. 6. 53. that if a man sell any commodity warranting it to be good, an action on the case lies against him. And it has been subsequently settled, (3) that possession is a warranty that the goods belong to the seller, for possession is a color of title, and an action lies upon the bare affirmation of the possessor that the goods are his own. That the goods are of a merchantable quality is also a warranty which the law implies. (4) In a late case (5), it was determined by three of the judges of B. R. that to ground the remedy at law by action upon the case, it is not necessary that the defendant should be a gainer by the deceit, or that he should collude with the person who is a gainer. And by that case the broad position in Comyns, (6) that "an action upon the case lies for a deceit when a man does any deceit to the damage of another;" and the opinion of Croke, J. in || *Bayley* v. 524 *Morrel*, (7) that "fraud without damage, or damage without fraud, gives no cause of action; but where these two do occur, there an action lieth," seem to have received an authoritative confirmation.

But a great difference has always been taken between the allegation of a thing as having actually happened, and as having been likely or probable to happen, for there are some modes of stating things that import higher degrees of assurance than others. As where a man possessed of a term of years, being about to sell it to A. declares that a third person would have given him *so much* for it, though in truth so much was never offered, no action upon the case will lie for *such* deceit; for this is a remote ground of estimation with which no prudent person ought to be satisfied. But if a man, treating for the sale of a house, assure

(2) Vid. Hob. 267. cites the opinion of Fairfax, J. 21 Ed. 4. 23.
(3) Lord Raym. 593. (4) Gilb. Evid. 187. (5) 3 T. R. 51.
(7) Com. Dig. tit. act upon the case for a deceit. A. 1.
(7) 3 Bulst. 95.

the intended purchaser, that the rent was £30 per annum, whereas, in truth the rent was £20 only, an action lies for
525 this deceit: for here is an averment of a *fact*, and of a ‖fact that furnishes a criterion of the real value of the premises (8). It is also an actionable deceit at law, though I do no harm to a man himself, if I make him the innocent cause of harm to another, so as to render him liable to an action, or, if without making him the immediate cause of injury, I so commit an injury myself, as to make the punishment fall upon an innocent third person; as, if I chase the cattle of A. into the land of J. S. so as to subject A. to the action of J. S., I render myself liable to the the action of A for this deceit (9). And it has been ruled, that if A. pursuade B. to do a thing lawful *in itself*, but injurious to C. and with the special view of injuring C. an action will lie for the fraud and combination (10). And it is ever a great aggravation of the offence to make use of legal process, in the accomplishment of a fraudulent purpose, as if a man, intending to steal a horse, take out a replevin, and thereby obtain a delivery of the horse from the sheriff (11).

SECTION II.

526 ‖Some of the most striking examples have been selected to point out to the student, the strong antipathy of the common law to all manner of fraud and deceit, which in the more flagrant instances are the subject of *criminal* as well as *civil* prosecution. But although the cognizance of every kind of fraud as much belongs to the common law, as to courts of equity, yet the spirit of reluctance in our legal maxims to *presume* fraud from the *circumstances* and *condition* of parties, and the insufficiency of *legal* remedies for the purposes of *discovery* in

(8) Vid Roll. Abr. 91—101; Salk. 211, pl. 3.
(9) Vid. Tyffyn v. Wingfield. Cro. Car. 325; Roll. Abr. 100, 101; Allen 3.
(10) Carth. 3, 4.
(11) Vid. 2 Institutes, 108.

cases of latent und complicated contrivance has occasioned such subjects to be principally agitated in courts of Equity, having been always a natural branch of its original jurisdiction (*a*).
But as it belongs to a more general treatise ‖on the subject of 527
frauds, (our present purpose being *principally* to illustrate the rules to which conveyances must conform in order to be available within the statutes against fraudulent conveyances,) to display *at large* the practice and principles of the different courts in the application of their respective remedies to the various artifices of fraud, the curiosity of the reader can expect to be gratified *here*, with only such a cursory view of the general and constitutional extent of the relief at law and in equity, against covinous and collusive practices, as may aid his conceptions of the constructive *supplemental* efficacy of those statutes which are the *principal* concern of this essay. This object, however, will perhaps, excuse a few particular observations, on the accessory relief furnished by courts of Equity, towards the development and subversion of fraud. It has been observed by the author of the Commentaries, (1,) that the concurrent cognizance of fraud is one of those branches of equitable jurisdiction, which arise from the authority inherent in courts of Equity of compelling a discovery upon the oath of the party: and "that in various kinds of ‖frauds they assume a concurrent jurisdiction, not 528
only for the sake of a discovery, but of a more *extensive* and *specific* relief, as by setting aside fraudulent deeds, decreeing reconveyances, or directing an absolute conveyance merely to stand as a security*."

This more extensive relief is instanced most prominently in the admission of strong circumstances as a ground to presume fraud in this court; whereas by the strictness of the common law, fraud must be *proved*, and can never be *presumed*. As a consequence of which, greater latitude in the collecting and establishing of fraud, a man may in a court of Equity be guilty

(*a*) Vid. 2 P. Wms. 154. 157. 220.
(1) 3 Bl. Com. 437, 439.

*Equity is as much bound by the statute of frauds, as the law is. 3 Taun. 176; 2 Call. 185; 18 Ves. jr. 183; 14 J. R. 488; 2 Desaus. Ch. R. 189; 3 Hen. & Mauf. 144 to 149 and cases there cited.

of a species of *negative* fraud, by his *silence* on an occasion where *silence speaks;* as where he stands by and sees another proceed in a transaction under an erroneous impression of facts, which he is able and bound in conscience to remove. Such a conduct operates as a kind of equitable estoppel (*b*,)
529 whereby ||the party guilty of it, having been *silent*, when he ought in conscience to have *spoken*, is debarred from *speaking* where conscience requires him to be *silent*.* As in the case of *Raw* v. *Potts* (2) affirmed in the House of Lords, where, A. being tenant in tail remainder to B. in tail, A., not knowing of the remainder over, made a settlement upon his wife for her life by way of jointure, which B. who knew of the entail, *engrossed*, and after the death of A. recovered at law against the widow by ejectment, the widow was relieved in Chancery by perpetual injunction. Where a man, by his representation, makes a partial disclosure of facts, and by mutilated and smothered statements induces and pursuades another to do that which must notoriously be prejudicial to him, there seems to be but little doubt, but that such conduct is a ground for the action upon
530 the case at law; but the party in the ||case last above cited was not called upon, except by his conscience, for a disclosure of

(*b*) The estoppel at common law aimed at the *prevention* of fraud which delights in duplicity, and inconsistency of conduct. See a notable instance in Vernon's case. 4 Rep. 46. and see the case of Slade v. Drake, Hob. 297, and the book 2 R. 3. fo. 19. But this *strict legal* estoppel worked within a narrow compass, being tied down to many rules and formalities, vid. Co. Litt. 352. a.

(2) Prec. in Chan. 35.

* It is said, that if I see A. building on my land through mistake or inadvertance, and I do not interfere or claim till afterwards, though I am all the time conusant of his right, chancery will oblige me to permit A. to enjoy his building &c. quietly. Bunb. 53; 9 Mod. 37. "I remember a case," says Lawrence J. "some years ago in which Lord Mansfield would not suffer a man to recover, even in ejectment, when he had stood by, and seen the defendant build on his land.

So if a second purchaser, knowing of the first purchase, get his own first recorded it is a fraud. Norcroft v. Widgery, 2 Mass. 505; Jackson v. Burgott, 10 J. R. 457; 3 Mass. 575; 1 Caines, R. 32; 8 J. R. 137; 1 J. C. R. 344; 4 do. 65; 5 do. 184, & 272; 6 do. 166. Shannon v. Bradstreet, 1 Sch. & Lef. 73; Green v. Price, 1 Munf. 449.

that which he concealed, nor was his non-disclosure coupled with any representations, that formed the inducement in the mind of the person, acting under the mistake. So, in a similar case (3,) where a mother, who was absolute owner of a term, (the same being limited to her in tail,) having been present at a treaty for her son's marriage, and having heard him declare, that the term was to come to him at his mother's death, had attested the deed whereby the reversion of the term was settled on the issue of the marriage, after her death, she was compelled in equity to make good the settlement. And the rule is *general*, that to take advantage of a mistake, which the man has the means and opportunity of setting right, is a fraud in *equity*. Thus in *Mead* v. *Webb* (4) where a lease was represented by the lessor's agent to be more valuable than it really was, and the lessor stood by and heard the misrepresentation without contradicting it, for this reason the lease was set aside. The cases of || *Hanning* v. 531 *Ferrers* (5,) *Hobbs* v. *Norton* (6,) and *Barrett* v. *Welles* (7) are remarkable examples of a similar kind of relief (8.) For other instances of the more extensive and specific remedy afforded in the court of Chancery in matters of fraud, the reader may be referred to the several heads of jurisdiction and relief in the books, under their respective titles of *underhand agreements in derogation of matrimonial contracts* (9). *Marriage brocage bonds* (10.) *Feigned conveyances, and promises to induce marriage* (11.) *Fraudulent representations for the same purpose* (12.) *Securities obtained upon pretence of demands that are fictitious* (13.) *Advantages taken of the weakness of others* (13.) *Advantages taken of another's distress* (14.) *Ine-*

[3] 2 Vern. 150. Hunsden v. Cheney. [4] Bro. P. C. 497.
[5] Eq. Abr. 357. [6] 1 Vern. 136. [7] Prec. in Chan. 131.
[8] And see 2 Vern. 370. 554. 726.
[9] Vid Peyton v. Bladwell, 1 Vern. 240. Morrison v. Arbuthnot, 1 Bro. Chan. R. 548, note ; and Pitcairne v. Ogbourne, 2 Ves. 375.
[10] 1 Chan. Rep. 87. Show. P. C. 76. Hall v. Patter.
[11] 1 Bro. P. C. 88. Webber v. Farmer.
[12] 1 Bro. C. R. 543, Neville v. Wilkinson.
[13] 2 Ch. Ca. 103. 2 P. Wms. 203. 2 Atk. 324. 4 Bro. P. C. 557. 2 Ves. 627. 7 Bro. P. C. 70.
[14] Ca. temp. Talb. 38. 3 Wodeson, Lect. 457. 2 Bro. C. R. 167.

quality and influence arising from the relationship of parties (15.) The admirable summary of the different relievable heads of fraud in courts of equity, exhibited by Lord Hardwicke in pronouncing his decree in the case of *Chesterfield et al.* v. 532 *Janssen* (16,) may ‖ perhaps be thought an useful appendix to this section.

(c) "1st, Said his Lordship, fraud, which is ***dolus malus***, 533 may be *actual*, arising from facts ‖and circumstances of

(15) 1 P. Wms. 118. Ca. temp. Talb. 111. 1 Ves. 381. 2 Ves. 259, 547. 2 Atk. 25, 258. 1 Bro. C. R. 126, 558. 2 do. 404. 3 do. 156. 4 do. 117.
(16) 2 Ves. 155.

(c) The reader will perhaps pardon the following concise view of the case: John Spencer in 1738, having contracted a debt, principally to tradesmen, of £20,000, which he was desirous of paying off, and having a well-grounded expectation of a considerable increase of fortune, at the death of his grandmother, the dutchess of Marlborough, was resolved to raise a sum of money upon this expectancy: he was a little above thirty, but impaired in his constitution by intemperance; the dutchess was seventy-eight, and healthy for her time of life. His proposal, which was sent to market, was to borrow the the sum of £5000, in consideration of which Mr. Spencer offered to enter into a security to pay the lender £10,000 at the death of the dutchess of Marlborough in case Mr. Spencer should survive her, but no payment at all was to be made if *she* should survive Mr. Spencer. The defendant after some hesitation, accepted the proposed terms: and accordingly in May, 1738, paid to Mr. Spencer the £5000 who thereupon executed to the defendant a bond in the penalty of £20,000 conditioned for the payment of £10,000 to the defendant on the death of the dutchess, in case Mr. Spencer should survive her but not otherwise. The dutchess of Marlborough died in October, 1744, and in two or three months afterwards on the defendant's delivering to Mr. Spencer the said bond to be cancelled, he executed a fresh bond, whereby he became bound to the defendant in the penalty of £20,000 for the payment of £10,000 with lawful interest, on the 19th of April then next, and executed also a warrant of attorney to empower a judgment to be recorded against him at the defendant's suit for the said £20,000 on the said bond, which judgment was afterwards entered up in Mr. Spencer's lifetime. Mr. Spencer in 1745, at different times paid two several sums of £1000 each, in part of his debt, and frequently declared that he was satisfied with the defendant's conduct, and also that it was his intention to pay his whole demand as soon as possible. The defendant after his death sued out a *scire facias* to have execution against the executors upon the judgment entered up against the testator. The executors applied to the court of chancery for an injunction, and to be relieved on payment of £5000 with interest from the time of advancing it.

imposition; which is the plainest case. 2. It ‖may be apparent from the intrinsic nature and subject of the bargain itself, such

Three points were made at the bar on the plaintiff's side, videlicet, 1. That the original contract was *usurious* within the statutes, as being for a greater premium than the law allowed, and if so, both the new and old security would fall to the ground. 2. That if the court was warranted to relieve against the first security the new security would be considered as a continuance of the first oppression, and consequently stand in an equally unfavorable light in that court.

The chancellor and Judges were unanimous in opinion. And, first, they were clear that the contract in question was not within the statutes of usury. The second point they all thought was not necessary to be decided, because they held the plaintiff's counsel to be clearly wrong in the third; for they were unanimous in thinking that whether the bargain was or was not originally such as the court would relieve against as unconscionable, the *renewal* and *recognition* of it by Mr. Spencer, in the circumstances in which he stood at the time of the second security given, was a complete confirmation of the contract, and removed all ground for the interference of the court.* The difficulty of deciding what bargains for expectancies are to be deemed unconscionable, was felt by the whole court; and they were glad to be relieved from the necessity of determining the case on that point. The sum of their observations, however, on that subject seemed to be, that no inflexible rule can govern the question, but that the equity of each case must arise out of its *particular* circumstances. To say that in no case a man shall, under present pressure, sell his expectancy, would often be to deprive the distressed of a reasonable resource that might save them from worse expedients; and to refuse a resonable advantage to the lender, would be equivalent to an universal prohibition of such contracts.† Parents and relations are sometimes penurious to their children and expectants, who, (to use the expression of Judge Burnett,) if hindered, sometimes, from supporting themselves by raising money upon their expectancies, *might starve in the desert within view of the land of Canaan.* On the other hand the consequences are to be dreaded of lending the countenance of the court to such transactions. It will *rarely* happen that such contracts are unaccompanied with mischievous intentions. They for the most part administer to profligacy on the one side, and to avarice on the other; and where want and covetousness bring a borrower and lender together, it is very unlikely that purity and equality should reign in their bargains. Such contracts tend to a delusion in what is of general concern—

* An advantage may perhaps be thought to arise from keeping the rule in some uncertainty, as it may be better for the morals of a community, that a sort of legal peril be perpetually overawing these transactions.

† In Gilb. Ch. Cases, 291, 2. it is said that where the father withholds subsistence from the son, whereby he is induced to enter into such a contract, equity will not relieve against it.

as no man in his senses, and ‖not under delusion, would
536 make on the one hand, and ‖such as no honest and fair

the provision for posterity. Such anticipating haste disturbs the moral order of things, by forcing into present existence what would otherwise have awaited the discretion of maturer years; and thus the borrower is deceived, and society injured. The parent or person on whose life the expectancy hangs, is also grossly deluded in being made to become the benefactor of a designing money-lender, where he meant to bestow importance and comfort on his posterity. The attention of the court of chancery has been always directed with anxiety to this evil; and though at first its interference was attracted by the *actual fraud*, which is common in such contracts, it extended its remedy with the extension of the mischief, and gave relief in cases where the contract carried in itself strong ‡ *intrinsic evidence only* of imposition, such as a gross inequality in the bargain, making it such as one man could not drive with another who had his eyes open and his senses clear, or who was not in such a necessitous predicament as to be incapable of resisting imposition and oppression. But the case of an heir of a family, with nothing but the hope of succession, dealing for his expectancy, is always excepted out of the ordinary cases; and as such contracts are pernicious in their pricple, courts of equity have great alacrity in setting them aside if there is any thing at all unconscionable in the transaction. § The courts also take a difference between a remainder-man in expectancy upon his *father's* ‖ life and living under his *father's protection*, and a remainder-man in expectancy upon the death of a *stranger;* especially if the son have other expectancies which render him dependent upon his father.

There is a right spirit in nature which all wise systems of positive laws must, under certain modifications, adopt, to be safe and durable. The eldest of all laws is the rule of filial submission; it is a law of the heart, which gave the first notions of organized government, and must be respected and followed in every sound system of jurisprudence. Regard to this primeval policy dictates the discouragement of all clandestine bargains with heirs to the delusion of the ancestor, who is thereby made to act upon a blind consideration for the benefit of those who have furtively obtruded themselves into the channel of his bounty, and the inexperienced are taught to conceal their circumstances from those who have a moral right to a disclosure, and whose

‡ Per Lord Thurlow in Gwynne v. Heaton, 1 Bro. Ch. Rep. 6. an *inadequate* consideration is not *alone* sufficient to vitiate the contract, although in order to do so, the consideration *must* be *inadequate*. Where property is sold for a sum grossly inadequate, the court has never suffered it to stand. His Lordship afterwards observed, that to set aside a conveyance, there must be an inequality *so* strong, gross, and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it.

§ Lord Thurlow in the above case of Gwynne v. Heaton, denied that the heir's having no provision from his father, made any difference.

‖ See the case of Twisleton and Griffiths, 1 P. Wms. 310.

man would accept on the other; which are unequitable and unconscionable bargains; ‖and of such even the *common* 537 *law* has taken notice. 3. A third kind of fraud is that which may be ‖*presumed from the circumstances and* 538 *condition of the parties contracting;* and this goes further than the *rule of law*, which is that it must be *proved*, and not *presumed*. 4. A fourth kind of fraud is collected or inferred, in the consideration of a court of equity, from the nature and circumstances of the transaction, as being an imposition or deceit practised on third persons not parties to the fraudulent agreement—of this kind are marriage brokage contracts, which, though neither of the parties be deceived therein, tend necessarily to the deceit of parents and friends: so in clandestine private agreements to return part of the portion of the wife, or of the provision stipulated for the husband, to the parent or guardian; in most of these cases the thing is transacted by the parties with their eyes open; but if there be fraud therein, this court holds the case infected thereby, and relieves. So where *(d)* a debtor enters into a deed of composition with ‖his creditors 539 for 10*s.* in the pound, on condition that all other creditors executed within a certain period; if the debtor privately agrees with one creditor, to induce him to sign this deed, that he will pay or secure to him a greater sum in respect of his particular debt, in this there can be no particular deceit on the debtor who

timely admonitions and reproofs might save them from destruction. There are, besides, reasons of policy for the legal discountenance of these clandestine bargains with young expectants drawn from the expediency of preventing the beggary of opulent and noble families, which are one support of the state; and though courts of equity are not on mere political reasons to set aside contracts, or to assume the office of the legislature, yet where there is a color on conscientious grounds for their interference, they will blend with their motives considerations of public utility; for though they cannot *make* laws, they will take the *spirit of the laws for their guide*, in repelling the social mischiefs which result from individual profligacy or avarice. Most of the acts of parliament which have been made for the suppression of these unconscientious dealings between men, do not import any want of power in courts of equity to give relief, but by making such proceedings void in law give a short remedy against them.

(d) Such cases of deceit are also remediable at law; see 2 T. R. 763, Cockshot v. Bennett, and see 3 T. R. 551.

is party thereto, but it tends to the deceit of the other creditors, who relied on an equal composition, and consented out of compassion to the debtor. So, if premiums be contracted to be given for preferring or recommending to a public office or employment, none of the parties are defrauded, but the persons having the legal appointment to these offices are or may be deceived thereby; or, if the person agreeing to take the premium have authority to appoint the officer, it tends to public mischief by introducing an unworthy object for an unworthy consideration. These cases shew what courts of equity mean when they profess to go on reasons drawn from public utility. To weaken the force of such reasons they have been called political ar-
540 guments, and said to be an attempt at introducing ‖politics into the decisions of courts of justice. But this is far from the true light in which it ought to be considered; for if the word *politics* be taken not in its *common acceptation*, but in its true *original* meaning, it comprehends every thing that concerns the government of the country, of which the administration of justice is a considerable part. And thus far, and in this sense is relief in a court of equity founded on public utility. Particular persons in their contracts shall not only transact *bona fide* among themselves, but shall not transact *mala fide* in respect of *other* persons who stand in such relation as either to be affected by the contract, or by the consequences of it; and as the rest of mankind, besides the parties contracting, are concerned, the case is properly said to be governed by public utility. 5. The last head of fraud, on which relief has been given, is that which infects catching bargains with heirs, reversioners, or expectants, in the life of the father, &c. against which relief has always been
541 extended. These have been generally ‖*mixed* cases, compounded of all or several species of fraud. Fraud, too, may be *presumed* or *inferred* from the circumstances or condition of the parties contracting; as from weakness on the one side, usury on the other; or extortion, or advantage taken of infirmity. And an appearance of fraud may arise from the nature of the bargain. In most of these cases have concurred deceit and illusion on other persons not *privy* to the fraudulent agreement. The father, ancestor, or relation, from whom the estate has been expected, has been kept in the dark. The heir or expectant has been

prevented from disclosing his circumstances, and resorting for advice to those who might have given him at the same time relief and instruction; the ancestor is misled, who has been induced thereby to leave his estate, not to his heir or family, but to a set of artful persons, who have divided the spoil *beforehand.*

SECTION III.

|| The principle of expounding beneficially and equitably 542
all statutes against fraud is agreeable to those strong maxims of resistance to all shapes of covin and deceit manifested by our legal and equitable jurisdictions. Notwithstanding these laws are greatly penal, the rule still holds of giving them an extended and liberal exposition. *(a)* ***In hiis enim quæ sunt favorabilia ||animæ, quamvis sunt damnosa rebus, fiat aliquando*** 543
extensio statuti.

(*a*) Statutes made in suppression of deceit and covin shall be equitably expounded, although they are greatly penal. Plowd. Comm. Wimbish v. Tailboys, 59. and see 1 Rep. 131.

The stat. 1 H. 7. c. 1. which gives a formedon in remainder against the pernor of the profits was made in suppression of covin (for a feoffment made to persons unknown to defraud those who had a right to the land was a great covin and deceit in our law) shall be equitably expounded. Plowd. 59.

And the statute of Marlbridge speaks of those "who used to enfeoff their eldest sons and heirs being within age;" yet if a man's *first* son be dead, and he enfeoff his *second* son, who is his heir, it is within the equity of the statute; or if he levy a *fine* to him, which is matter of record, this shall be within the equity of the statute, though it speaks only of a *feoffment.* Id. ib.

So the statute 32 H. 8. c. 9. shall be extended by equity, being enacted for the suppression of fraud in buying pretended titles; and *leases for years* as well as *higher estates,* shall be intended by it. Plowd. 78. Partridge v. Strange and Croker.

So the stat. 31 Eliz. c. 6. to prevent simony is to be *largely* expounded though *penal.* Hob. 75. The King v. Bishop of Norwich.

Statutes in suppression of fraud bind the king; as in the case of Magdalen College, 11 Rep. 73. if one intending to sell his land had by fraud conveyed it by deed enrolled to the king, in order to deceive the purchaser, and he

‖The statutes 13 and 27 Eliz. were conceived in very general language to give room for these maxims to govern their construction and point their application; and as a preventive operation was thought to be most agreeable to their true intention, *that* being the best mode of dealing with the delitescency of the subject, these statutes were construed as calling for a more jealous scrutiny into circumstances indicating duplicity and illusion, and a more *constructive* collection of ‖the *evidences* of fraudulent design than had before been adopted. Ten years after the passing of the statute 13 Eliz. c. 5. the great case, called *Twyne's* case, in the Reports, was determined, which, as it is short, it may be as well to introduce a second time in this place. P. was indebted to T. in £400 and was indebted also to C. in £200. C. brought an action of debt against P. and *pending the writ*, P., being possessed of goods and chattels of the value of £300 *secretly* made a *general* deed of gift of *all* his goods and chattels, real and personal whatsoever, to T. in satisfaction of his debt; notwithstanding which P. *continued in possession of the goods*, some of which he sold again, shore the sheep and marked them with his own mark. Afterwards C. had

545

afterwards sold the land for a *valuable consideration*, and makes a conveyance accordingly, in this case the purchaser shall enjoy the land against the king by virtue of the stat. 27 Eliz. c. 4. for the act being general, and made for suppressing fraud, shall bind the king.

The statute 11 H. 8. c. 5. being made to suppress fraud and deceit, shall be expounded *beneficially*; and therefore whereas the words of that statute are that "where tenant for life or years has demised or granted to the intent that those in reversion (viz. their lessors, their heirs, and assigns,) should not know their names, and afterwards the first tenants continually occupy the lands, &c. and make waste, it is ordained, &c. that he in reversion (in such case) shall maintain a writ of waste against the tenant for life or years;" yet *every assignee* of the first lessee *mediate* or *immediate* is within the said act, although *not therein mentioned*; also *he in remainder* is within the act, as well as he *in reversion*, although both in the preamble and body of the act there is mention made only of him in *reversion*. Booth's case, 5 Rep. 77. a.

5 & 6 Ed. 6. c. 16. Sale of offices. This statute being against fraud is construed as a *remedial* rather than a *penal* law. Vid. Law v. Law, 3 P. Wms. 391.

Many other examples of the same kind may be seen in Plowden's Commentaries, p. 59. Wimbish v. Tailboys, 1 Rep. 131. a. 3 Rep. 78. Fermor's case, 5 Rep. 80. Fitzherbert's case.

judgment against P. and took out a *fieri facias* directed to the sheriff of Southampton, who, by force of the said writ, came to levy the said goods. Divers persons, by the command of T. resisted the sheriff by force, claiming the goods as the goods of T. by virtue of the said gift; and whether the gift, on the whole matter, was a good gift, or fraudulent and ‖void 546 within the 13 Eliz. c. 5. was the question. It was determined by the Lord Keeper of the Great Seal, by the Chief Justices, and by the whole court of Star Chamber, that the gift was fraudulent within the statute. And as the signs and marks of fraud it was said by the court,

1. That the gift was general, without exception of the donor's apparel, or of any thing of necessity.

2. The donor continued in possession, and used the goods as his own; and by means thereof traded with others, and defrauded and deceived them.

3. It was made in secret.

4. It was made pending the writ.

5. There was a trust between the parties; for the donor possessed all, and used them as his proper goods; and fraud is always apparelled and clad with a trust.

‖6. The deed expresses that the gift was made honestly, 547 truly, and *bona fide, et clausula et inconsueta semper inducunt suspicionem.**

We are to observe, that there was a perfectly good ostensible consideration for the gift, and that the whole objection rested on

*Inadequacy of price in the sale of property is strong evidence of fraud. Pr. Ch. 138, 538; 6 Ves. Jr. 253; 3 Dall. 502; 9 Ves. Jr. 246; Burrows v. Locke, 10 do. 292, 470; 1 Vern. 465; 13 J. R. 484; 11 J. R. 555; 1 Ball & Beatty, 241; Buist v. Smith, 2 Desaus. Ch. R. 214.

As to badges of fraud, the reader see Bartlett v. Bagby, 3 Mass. 487; Portland Bank v. Stacy et al., 4 do. 661; Pierce v. Jackson, 6 do. 242; Haywood v. Marsh, 6 Yeryer 69–108; McIntosh v. Ladd, 1 Humph. 459; Wendell v. Van Rensselaer, 1 J. C. R. 35; Hildreth v. Sand, 2 do. 54; Sand v. Codwise, 4 J. R. 566; Burrows v. Stoddard, 3 Conn. 160; Pettibone v. Griswold, 4 do. 158; Harvey v. Peck, 1 Munf. 526; Wright v. Hancock, 3 do. 521; Badlem v. Tucker, 1 Pick. 398; Smith v. Henry, 1 Hill, 16; 1 Binn. 503; Engle v. Burns, 5 Call. 463; 4 Dall. 76–86; 1 Bay. 90; 3 Cranch, 27.

the proofs of *mala fides (b,)* and therefore Lord Coke gives the following advice grounded on the resolution of this case: "When any gift shall be made to you in satisfaction of a debt, by one who is indebted to others also: 1. Let it be made in a public manner, and before the neighbors, and not in private, 548 for secrecy is a mark of fraud. 2. Let the ||goods and chattels be appraised by good people to the very value, and take a gift in particular *(c)* in satisfaction of your debt. 3. Presently after the gift, take possession of the goods, for continuance of possession in the donor is a sign of trust."

The general conclusion from this case of *Twyne* is, that evidence of the fraudulent intent supersedes the whole inquiry into the consideration, for no merit in any of the parties to a transaction can save it if it carries intrinsically or extrinsically the plain characters of fraud. And one of the plainest of these characters of fraud is the possession of the party contradicting the visible purport of an absolute conveyance; which inconsistent retention of the thing pretended to be transferred is very much aggravated as an evidence of fraud, if the possession is accompanied by acts of ownership, for this plainly denotes a secret separation of the legal and beneficial property. The natu- 549 ral consequences of ||this contradictory possession involve a two-fold injury. The beneficial interest in the goods so circumstanced belong either to the assignor or assignee; if they belong to the assignor, he might be enabled by his mock transfer, if it could prevail, to continue to himself the enjoyment of *that* which in conscience belongs to his creditors; if they really belong to the donee or assignee, the possessor might be enabled to attract to himself an illusory credit, against which ordinary pru-

(*b*) In Wilson v. Wormal, Godb. 161, it was said to be law, that if a man, having goods of the value of £30 be indebted to two men, viz. to one in £20 and in £10 to another; and the debtor assigns to him, whose debt is £10 all his goods, to the intent that for the residue above the £10 he shall be favorable to him; this assignment is *altogether* void, because it is fraudulent in *part*. But Foster J. said, that it should only be void for the surplus. It seems clear, however, that, if the donor had owed £10 more to a third creditor, or the whole £30 to the disappointed creditor in the above case, the donee, as implicated in the fraud, could have retained nothing.

(*c*) *i. e.* expressly.

dence is an insufficient guard. But the degree of public inconvenience produced by this separation of the property from the possession depends greatly upon the nature of the thing the property in which is transferred. The property of some things is not wholly ascertained by the possession; and the nature and condition of other things may preclude the possibility of a specific transfer at the moment of the sale.

Thus where *land* is conveyed, the want of possession casts a less degree of suspicion upon the transaction, than where *goods* are the subject of the conveyance, for with respect to land, the property is evidenced ‖by the possession of the title 550 deeds, and manual occupation is no criterion of ownership. But in looking for the real owner of *moveable chattels* we attend to the circumstance of possession; since they are not only *capable* of specific delivery, but are ordinarily *used* and *enjoyed* by being *possessed*. Land is enjoyed and possessed by title; and fraud in the transfer of it, is mainly to be inferred from the inconsistency of the title with the possession of the title deeds. Fixtures to the freehold follow the land, and are secured in interest to the lessee or assignee by the muniments of his title. (1)

The property of a warehouse may pass by a symbolical delivery: the delivery of the keys, which open it, is construed to be a delivery of the goods contained within it, (2).

So, with respect to ships at sea, if an assignment be made, and the charter-party, invoice, &c. be delivered, all means are used to transfer the thing, which the circumstances of the case permit (3).

‖Thus in *Jacobs* v. *Shepherd* (4), where an assignment of 551 goods which were actually at the time of assignment beyond sea, had been set aside by Sir J. Jekyl at the rolls, as falling within the bankrupt law, the borrower being in failing circumstances, the decree was reversed by Lord Ch. King upon an appeal (5).

And, in general, with respect to this order of cases, we may remark, that the want of an immediate transfer of the possession

(1) Vide Poole's case, Salk. 368. (2) 1 Atk. 170.

(3) Brown v. Heathcote, 160. Atkinson v. Malling 2 T. R. 462.

(4) 1 Burr. 478.

(5) Vid. Lempriere v. Pasley, 2 T. R. 485. et vid. Falkner v. Case, 1 Bro. C. R. 125. 2 T. R. 491.

is no direct badge of fraud within the stat. 13. El. c. 5. or any title to the commissioners under the stat. 21 Jac. c. 19. of bankrupts.

But in conveyance of land we may observe, that there is some difference of construction under the stat. 13 El. c. 5. and the stat. 21 Jac. c. 19. arising from the diversity in the objects of those statutes. The former being principally framed to present fraud upon the creditors, whose legal remedies are attempted to be defeated, while the debtors enjoy the property out of which
552 their debts ought to ‖be satisfied, the latter having chiefly in view not so much the prevention of *actual* fraud as the disappointment of those secret engagements by which a delusive credit *may* be obtained to the injury of the fair trader, and by which secret priorities are endeavored to be established in derogation of the just claims of the creditors at large. A particular intent, therefore, to defraud, by a retention of possession, is not necessary to be proved under the stat. 21 Jac. 1. to let in the claims of the general creditors; though the conveyance be ever so fair, yet the rule upon the statute seems to be, that if the assignee has trusted the assignor with the possession of the property conveyed, and has left him still the reputed owner, he has thereby enabled him to acquire more credit than he ought, and by thus giving him credit, he has left himself liable to the casualities of another's trade, and shall therefore in case of the failure of such person, come in only upon a foot with the rest of his
553 creditors‖ (*c*). As the possession of land therefore, is not

(*c*) It seems not to be necessary to constitute the reputed ownership within the meaning of the 21 Jac. 1. that any proof of actual disposition, by such reputed owner, should be made out; for, if the goods were actually disposed of they would be out of the power of the assignees; but, according to the opinion of the late Lord C. J. of C. P. delivered in the case of Lingham v. Biggs, 1 Bos. and Pull. 82. the words of the statute must not have the absolute sense they seem to import, but must have a meaning consistent with the end proposed to be attained by the statute. Therefore if a man be the reputed owner of goods, and *appear* to have the order and disposition of them, he must be *understood* to have taken upon himself the sale, order, and disposition within the meaning of the statute; and no inconvenience will follow from this doctrine, for though possession is always evidence of ownership, and with nothing to oppose it, will create a reputation of it, yet it is evidence which may be so satisfactorily opposed as to destroy that reputation. As, if a re-

that evidence of absolute ownership which is calculated to mislead the public, and to invite a delusive confidence; and as common prudence demands that before we trust to a man's seeming property in land, we should require the production of his title deeds, the inconveniences in the contemplation of that statute are less likely to follow from such division of ownership from possession in the case of land, than where goods are the subject; at least the means of obviating imposition in the former case, are open to ordinary circumspection, and *vigilantibus non dormientibus jura subveniunt.*

But the leading object, as has been observed, of the statute 13 Eliz. c. 5. was to prevent those collusive transfers of the legal ownership which place the property of a man indebted out of the reach of his *bona fide* creditors, and leave to him the beneficial enjoyment of *that* which ought in conscience to be open to their legal remedies. Possession, therefore, of land 555 after an absolute conveyance, is evidence of a fraudulent design within the stat. 13 El. c. 5. And if this possession be accompanied with acts of ownership, the evidence of fraud under that statute becomes very hard to be resisted. It may happen, however, that a man, having conveyed all his property to a trustee for the satisfaction of creditors, is still left in the occupation of the land conveyed as a bailiff and manager for the benefit of the trust interest, with a fixed and regular salary. Such possession, as it should seem, would be no badge of fraud, within the statute of 13 El. c. 5. for possession is only evidence of fraud under that statute, by being a strong indication of a secret trust and reservation; but here the avowed and explicit intention of the deed could only be *answered* by the *possession;*

spectable tradesman residing in a house in London, were to make a journey to a sea port, and there hire a ready-furnished house; or if a man were to hire a job coach and horses; all the world would say, as to the first instance, that such person was the reputed owner of the furniture of the house in London, and not of the one he had hired; and, as to the second instance, it is notorious that people do not always drive their own coaches, and such possession is too equivocal to create a reputation of ownership. Vid. Bryson v. Wylie, Cooke's B. L. 234; Mace v. Cadell, Cowp. 232; Walker v. Burnell, Dougl. 317; Collins v. Forbes 3 T. R. 316; Gordon v. E. I. Company, 7 T. R. 237; Manton v. Moore, 7 T. R. 67.

and the whole transaction might well repose on a foundation of consistency and honor.

As all cases upon the statute 21 Jac. 1. c. 19. sect. 5. turn upon the apparent ownership, and the consequent injury to
556 fair creditors from the deception ||thereby induced, the operation of that statute may be generally distinguished from that of the 13 Eliz. c. 5. by adverting to that criterion, for the conveyance and continuance in possession operate under the statute of Eliz. as an *argument* of intentional fraud, but the transaction falls within the mischief of the statute 21 Jac. 1. by affording an *opportunity* of *committing* fraud, and by breaking through the legal equality of the general creditors. But it is to be observed, that the retention of possession by a party conveying is not uncontrollable evidence under the statute of James, any more than under the statute of Elizabeth: thus it has been frequently determined that the possession of the bankrupt is explainable by circumstances; as where the party has been left in the bare possession and custody of goods without the power of ordering and disposing of the same. (6)

But a difference is taken in respect to the operation of the statute 21 Jac. between mortgages of land and chattels real, and
557 mortgages of mere goods and moveables; || since, upon the principle before mentioned, where the title deeds are the natural and proper documents to refer to for ascertaining the property, the mere possession cannot reasonably be complained of by the creditor, as establishing a deceit against him, or as
558 any sensible ground for the confidence he has || reposed. But by the great case (*d*) of *Ryall* v. *Rolle*, (7) all condi-

(6) West v. Skip, 1 Ves. 243. ex parte Flyn, 1 Atk. 185.

(7) 1 Atk. 614.

(*d*) Much industry was used in that case, in maintaining a distinction between the pignus and hypotheca, in the Roman law. It was said that the pignus or pawn required an actual delivery, but that the hypotheca or mortgage did not. But the premises were wrong in fact, and the conclusion wrong in inference; for it was shewn by Mr. J. Burnet that delivery was not of the essence of a pawn in the Roman law, and that if the distinction *had* been rightly stated between the pignus and hypotheca, yet, that the hypotheca of the Romans was not of the same nature with the English mortgage, for an hypotheca gave only a lien without property, with a right to be satisfied on failure of the

tional sales of goods, where the party conveying retains the possession, are regarded as within the spirit and meaning of the statute 21 Jac. 1.

In the case of *Stone* v. *Grubham*, (8) wherein the doctrine was general, though the subject in question was land, a different construction prevailed as to the operation of the statute 13 Eliz. cap. 5. for there it was said by Coke C. J. that if an *absolute* conveyance be made, and the possession of the thing conveyed be retained by the party conveying, the transaction has the face of fraud; but if the interest do not pass *absolutely* but upon a *future* condition, continuance in possession shall not in judgment of law be said to be fraudulent; and this, said the Chief Justice, is very clear. ‖ It was likewise there observed by the 559 court, that secrecy *(d)* is a great badge of fraud, but no concluding proof. It was then demanded, in consequence of an objection made at the bar, in whose custody the lease was after the gift; to which it was answered and proved that the same was in the custody of Sir R. S. to whom the assignment was made. *(e)*

In reading the case of *Edwards* v. *Harben*, (9) it is difficult to

condition. A mortgage is an immediate conveyance, with a power to redeem, and gives the legal property. Pawns in the English law require a delivery, but give the custody only and not the legal ownership. The pawnee has the special, but the pawner the general property. But a mortgagee has the legal and general property in the thing mortgaged. And upon this principle, the court determined in Ryall v. Rolle, that a conditional bill of sale, or a mortgage of goods, made the possession by the mortgagor, a possession permitted by the true owner, *i e.* the conditional vendee, so as to bring the case within the statute 21 Jac. 1.

(8) 2 Bulst. 225. 9) 2 T. R, 587.

(d) Whether secrecy and concealment are marks of fraud will always depend upon the circumstances of the case, for sometimes they are not only innocent but prudent. See Sid. 134. and Bath and Montague's case, 3 Chan. Ca. 105. per Holt C. J.

(e) It has been resolved, that though the mortgage be forfeited at law, continuance of possession in the mortgagor, is no badge of fraud within the statute of Elizabeth, for this falls within those cases, to which the rule applies, which says, that a transaction, good at the commencement, shall not become fraudulent by matter *ex post facto*. Vid. Lady Lambert's case, Shepp. Touchst. 65.

preserve the mind from confusion as to the distinct principles of the statutes 13 El. c. 5. and 21 Jac. 1. c. 19. One of the
560 grounds taken in the argument || for the plaintiff was the injurious consequences probable to arise from the foundation of false credit, which was laid in the defendant by his apparent ownership, and thus far he was making out a case for the operation of the statute 21 Jac. 1. but when he coupled with this proposition the inference of prospective fraud in the defendant from the rule that every man is presumed in law to intend the probable consequences of his own acts, the case was brought within the scope and meaning of the stat. 13 Eliz. for it is only by fixing upon it the implication of fraudulent intent that contrarient possession can be made to attract the principle of that statute. Thus it was not among the badges of fraud specified in *Twyne's* case that the possessor was placed in a predicament to induce a false credit; but the donor was stated positively to have exercised acts of decided ownership, to have sold some of the sheep, and to have traded and trafficked with them, whereby he defrauded and deceived those who dealt with him.

561 || By the unanimous opinion of all the Judges taken upon the case of *Bamford* v. *Baron*, (10) a distinction was taken and settled as to the operation of the stat. 13 El. c. 5. in cases of possession after conveyances of goods, between such bills of sale as are to have their completion immediately, and those which are prospective to a future event; for in the latter case, the continuance of possession in the vendor till that future time, or till the condition performed (*f*) is consistent with, or, in the language in which the rule is expressed, accompanies and follows the deed.

In the above cited case of *Edwards* v. *Harben* the same doctrine was recognized and confirmed. And there the case of *Bucknal* v. *Roiston* (11) was referred to, which appears to be rather a stronger case than either of the foregoing. Brewer,
562 having shipped a || cargo of goods, borrowed of the plaintiffs £600 on bottomry, and at the same time made a bill of sale

(10) 2 T. R. 594, note. (11) Prec. in Chan. 287.

(*f*) Vid. Lady Lambert's case, Shepp. Touchst. 65. and Vid. Stone v. Grubham, 2. Bulst. 225. being good at the commencement; it seems it shall continue so, according to those cases, notwithstanding possession is retained after the forfeiture.

of the goods on board the ship (which were invoiced particularly,) and of the *produce and advantage thereof* to the plaintiffs; and this was in the nature of a security, or pledge for the repayment of the £600 upon the ship's reigning (as it was called) three years. The ship performed her voyage, and returned home richly laden; but it happened that Brewer died at sea upon his return home, and the defendant Royston, who was a creditor by judgment obtained before the sale of these goods for £1500, took out administration, and possessed himself of the effects of Brewer. The plaintiffs brought their bill to have an account and discovery of those goods, and to have satisfaction for the produce and advantage that was made thereof. It was urged for the defendants that Brewer's keeping possession of the goods after the sale made it fraudulent and void as to creditors; but the Lord Chancellor Cowper was of opinion that the trust of the goods appeared upon the very face of the bill of sale; that, though they were ‖ sold to the plaintiffs, yet Brewer was intrusted by the 563 plaintiffs to negotiate and sell them for their advantage; and Brewer's keeping possession of them was not to induce a false credit, but for a particular purpose agreed upon at the time of the sale: that it was true that in the case of a bankrupt, such keeping possession after a sale would make the sale void against his creditors by the statutes: but that, in the case under consideration, the plaintiffs were entitled to the trust of these goods immediately upon the sale, and to all advantages consequential upon such trusts, and might follow the goods for that purpose.

The same distinction was adopted by Lord Mansfield as the foundation of his judgment in the case of *Cadogan* v. *Kennet* (12) where his Lordship observed, in the answer to the argument from possession that it was a part of the *trust* that the goods should continue in the house. But, according to the determination of *Edwards* v. *Harben*, where the conveyance is *absolute*, and without an alteration of possession, the transaction ‖ is fraudulent in point of law; and it was said by Sir Ed- 564 ward Northey, (13) in *Bucknal* v. *Roiston*, that it had been ruled forty times in his experience at Guildhall, that if a man sold goods, and still continued in possession as visible owner of them,

(12) Cowp. 432. (13) Prec. in Chan. 287.

such sale was fraudulent and void as to creditors, and that the law had always been so holden.

In a very late case, however, in the Common Pleas, (14) a point arose upon the question of the inferibility of fraud from possession after a sale of goods, not readily resolvable by the criterion laid down in *Edwards* v. *Harben*. In the case above alluded to, which was tried before Lord Eldon, Ch. J. at the Westminster sittings after Michaelmas term, 1799, notwithstanding possession did not accompany and follow the deed, his lordship left it to the jury to judge from all the circumstances taken together, whether fraud could be properly imputed to the plaintiff or not. The case was thus: An execution having issued against the goods of A. his furniture was taken and put up
565 to sale by ‖the sheriff of Surry; B. who was the brother-in-law of A. but not a creditor, became the purchaser, and a bill of sale was made out to B. dated the 13th November, 1798: nevertheless, A. was permitted by B. to continue in possession of the goods, in order that he might be able to carry on his business; but being soon after arrested and committed to prison, he executed a bill of sale of the same goods, dated the 11th March, 1799, to the defendant, to whom he was indebted in the sum of £15 5*s*. The defendant having taken possession according to the last bill of sale received a notice from B. not to dispose of the goods, stating his prior title. On the 14th of March the landlord of the premises authorized the defendant to distrain to the amount of £12 10*s*. for rent due from A. for two quarters, which the defendant paid, and on the 26th of the same month sold the goods for £26 14*s*. 6*d*.; the expenses of the bill of sale to the defendant, of keeping possession, and of the auction, added to the rent advanced by the defendant, amounted to £26 4*s*. 8*d*. leaving a balance in the hands of the de-
566 fendant of 9*s*. 10*d*. ‖ The title of the defendant under the second bill of sale was contested by B., the assignee in the first, by an action to recover the produce of the sale made by the defendant, after deducting the amount of the rent paid to the landlord. And the jury, being directed by the Chief Justice to consider whether the plaintiff had purchased the goods to

(14) Kidd v. Rawlingson, C. P. Hil. Term 1800. 2 Bos. and Pull.

defeat any execution by the rest of the creditors of A., were of opinion that the purchase was not made with that view, and gave a verdict for the plaintiff accordingly. But an endeavor being made in the succeeding term to set aside this verdict on the ground that the first bill of sale, being not accompanied and followed by the possession according to the doctrine of *Bamford* v. *Baron* and *Edwards* v. *Harben*, the bench was unanimous in supporting the verdict.

The Lord Ch. J. remarked that the plaintiff was not a creditor of A. and did not buy the goods as the means of satisfying any debt of his own, nor, indeed, could he so do, for the sheriff was to receive the money produced by the sale; nor was the purchase made ‖with a view to defeat creditors, but out 567 of mere kindness to A. to whom the plaintiff was related; that if, under these circumstances, the bill of sale was fraudulent, the plaintiff must suffer the legal consequences of his benevolent disposition. But his lordship said, that, as it seemed to him, this did not fall within the principle of *Twyne's* case, and the other cases on the subject, where the parties stood in the relation of debtor and creditor, and where it was their intention to defeat the other creditors; that it appeared to him to be a *new* case; for that the goods were purchased at a public sale by a person who had never acquired the character of a creditor, and were then lent to the original owner for a temporary and honest purpose. If Kidd had lent the money to A. to buy these goods, and had then taken a conveyance of the goods as a security for his debt thus arising out of the mere act of lending the money, leaving A. in possession of the goods, that would not have been a fraudulent act: for which his lordship cited the Law of Nisi Prius, fo. 258. where Mr. Justice Buller, after stating the case ‖of a conveyance which was holden to be fraudulent, 568 because the donor continued in possession, added, that "the donor's continuing in possession was not in all cases a mark of fraud; as where a donor lends his donee money to buy goods, and at the same time takes a bill of sale of them for securing the money."

It would be difficult, continued his Lordship, to distinguish the transaction in question from that case, unless indeed in the circumstance of the public sale by the sheriff, which certainly was

a distinction greatly in favor of the plaintiff; his Lordship added, that it appeared to him at the trial that Kidd might be considered as the donor of these goods, or as lending money to A. to purchase them through the medium of the sheriff, and taking a bill of sale as a security for the money, which way of consideration it would bring into identity with the case put by Mr. Justice Buller in the passage from his Nisi Prius above cited. Mr. Justice Heath adverted to the notoriety of the sale, as being correspondent to the advice given by Lord Coke in *Twyne's* case,
569 who recommends that a gift in satisfaction || of a debt by one who is indebted also to others at the time, be made in a public manner, before the neighbors, and not in private, for secrecy is a mark of fraud.

Nothing need be added, by way of elucidation, to the opinion of the bench, unless it be observed, for the sake of connecting it with the principles of a former page, that the sale by the sheriff was in itself an act completed; it was executed under the authority and according to the exigency of law, and every object of that transaction was obtained. The creditor, for whose debt the levy was made, was not the party that granted the indulgence by permitting the possession, but the possession originated afresh in a new gift by the purchaser; for the manual process of giving and receiving could not be necessary to give to the transaction its substance and character. Though the possession was not literally transplanted, it grew, by virtue of the permission of the purchaser, upon a different stock from that to which it at first belonged. The possession, therefore, could not
570 be coupled with || the execution and sale by the sheriff, so as to attach upon *them* any mark of fraud. And as to the transaction which followed the purchase from the sheriff, it seems improper to divide it into two distinct considerations by supposing A. to remain the visible owner, and then to make a fresh conveyance to B. contradicted by his retention of possession, for in substance a new possession accrued by the gift of the plaintiff, or rather the subsequent possession of A. *was* the gift of the plaintiff, *originally* modified by the bill of sale, which shaped it into a loan or qualified temporary enjoyment at the very moment in which the new possession was given. The whole question submitted to the jury was, whether such possession was a medi-

tated fraud, and the court did not mix with the consideration the danger of a delusive credit to be obtained by such spurious ownership, which, unless by fair inference such consequences can prospectively be coupled with the transaction, seems to be exclusively the question under the statute of bankrupts, 21 Jac. 1. c. 19. ‖Our notions can only be rendered clear 571 upon this subject by distinguishing these cases of possession retained after a conveyance which admit of a natural explanation, so as to reconcile such possession with the nature and purport of the conveyance, from all those instances where the possession, so far from making an integral part of, or, if the expression may be allowed, from being in harmony with the transaction, is at variance with its obvious and ostensible design.

It seems proper in the next place to observe, that the intention of the parties cannot affect and qualify a legal proceeding so as to render any possession tenable and secure, that contradicts the intention of the law.* Thus, in the case cited by Sir Edward Northey in arguing for the defendant in *Bucknal* v. *Roiston*, (15) where A. took out execution against B. by agreement between them, and B. was suffered to retain possession of his goods upon certain terms, and afterwards C. obtained judgment for a debt against B. and took his goods in execution, C. was justified by law in so doing, since the first execution was clearly fraudulent ‖and void against him. And as the 572 sheriff is bound to take notice at his peril of his property in

(15) Prec. in Chan. 286. et vid. 1 Ves, 245. 356.

(*) Where one absolutely sells land or goods, as on the face of his deeds, or mortgages goods: and yet remains in possession as owner, the possession is inconsistent with the deed and fraud is presumed; but the presumption may be repelled, 1. If the modified interest of the vendor under the deed makes it consistent with it, he keeps possession; 2. If such possession necessarily arise out of the transaction between the parties, and they have in view an honest purpose. New. on Cont. 374; Bucknal v. Roiston, Pr. Ch. 285; Cole v. Davis, 1 Raym. 724; Kidd v. Rawlinson, 2 B. & P. 59, 60; 4 Dall. 208; Lady Lambert's case, Shep. Touch. 67; 5 Johns. R. 256; 1 Cranch 309; see also Paget v. Perchard, 1 Esp. 205; Wordall v. Smith, 1 Camp. 333; Ryall v. Roll, 1 Wils. 260, and 3 Burr. 831, cited in New. on Cont. 376; 9 Johns. R. 337; 2 T. R. 596; 1 Johns. Ca. 156; Patten v. Smith. 4 Conn. R. 159; Badlem v. Tucker, 1 Pick. 397.

the goods, (16) questions on these points, often arise in actions against the sheriff for a false return. Thus (17) where it was proved in an action for a false return, that the warrant upon *fieri facias* was directed to three persons, one of whom was a special bailiff; and that the plaintiff's attorney was present at the time of executing it, and ordered the special bailiff to use the defendant in the first action kindly, and not to take any of his household goods; and that another of the bailiffs rode round the farm and grounds and said "I seize all this corn and cattle for the use of the plaintiff," and took some account thereof; and afterwards the defendant's landlord sued out a *fieri facias*, and the sheriff's bailiffs not being in possession of the goods under the former writ, nor having left any body for the custody thereof, procured his execution to be executed: and the sheriff returned *nulla bona* to the plaintiff's writ; it was left to the jury to say whether the first execution was fraudulent or not, and they found for the sheriff.

573 ‖And so, in the case of *Rice* v. *Serjeant*, (18) where A. had taken out a *fieri facias* against B. and procured the sheriff to seize the goods, but directed him to proceed no further, and suffered the goods to remain in the custody of the debtor; and afterwards another creditor obtained judgment against B. and took out execution; the question being whether the sheriff could seize upon the same goods, it was holden *per curium* that he might, for the former was a fraudulent execution, and he was justified in returning *nulla bona* upon it.

With respect to another of the badges of fraud enumerated in *Twyne's* case, viz. that the conveyance was made *pending the writ*, it may be remarked that although a gift made with a view to defraud creditors was void as well before as since the statute 13 Eliz. c. 5.; and though at common law examples of such avoidance of conveyances mesne between judgment and execution are frequent even where the damages recovered
574 arose in an action for a *tort*, and not upon ‖any original debt or promise, (19) yet that the instances are very rare, if

(16) Gilb. Exec. 21. 1 Keb. 946. 4 T. R. 621.

(17) 1 Wils. 44, et vid. 1 Lord Raym. 252. 5 Mod. 375.

(18) 7 Mod. 37.

(19) Vin. Brook. tit. Collusion, pl. 9 per Belknap. Id. tit. Tresp. pl. 240 Id. Execution, pl. 80. Id. Done, pl. 20. et 22. Li. Ass. 44. 72.

any are to be found, of the mere *pendency* of an action's being regarded as a badge of fraud before the statute in question was enacted. And this seems to have been a point of some doubt even after the promulgation of the statute, for in a case determined in the 28th year of Eliz. (20) where, an attachment having been issued against J. S., and B. in disturbance of the said process having shewed to the sheriff a conveyance by which he claimed the goods, the question was, whether such avowing of the conveyance was within the statute, as it did not go in delay of execution, no *judgment* being given, but only in delay of process; but the court held *contra* by reason of the words of the statute, *delay, hinder, or defraud creditors of their just and lawful actions, suits, &c.* And it appears that Periam and Rhodes, Justices, conceived, that, avowing such conveyance, though *no suit* were depending, was within the statute: though of this Anderson, C. J. doubted. But in other cases we observe that the statute was more vigorously expounded, and that it ‖operated to remove this hesitation of the courts, by 575 confirming their disposition in disfavor of voluntary conveyances, whereby creditors were defeated of their remedies, and, in general, to color more strongly the constructive indications of fraud for the protection of valuable rights.

A great case (21) upon this subject took place in the 12th and 13th years of Queen Elizabeth, in Michaelmas term, which was in substance as follows: In an action of debt on a bond for one thousand marks, the defendant pleaded conditions performed; and the parties being at issue upon a particular point, the defendant, supposing it certain the issue would be found against him, enfeoffed divers persons, *i. e.* three of his friends, by deed indented, to the use of his eldest son in tail, remainder to the use of his second son in tail, with divers remainders over; the ultimate remainder being limited to the right heirs of the feoffor; and the deed contained a proviso, that if at any time the feoffor should pay or tender a piece of gold of ten shillings value ‖to any of the feoffees, all the uses should be extinct, and 576 that the feoffees should stand seised to the use of the feoffor and his heirs. Notwithstanding the feoffment the feoffor con-

(20) 1 Leon. 47.

(21) Dyer, 295. a.

tinued to receive the profits of the land comprized in the deed. And all this matter was found by the inquisition of a jury, and returned by the sheriff upon an elegit, with the value of the lands, and the return expressed that the sheriff and the jury were in doubt whether the lands were liable to an execution as to a moiety; and they accordingly prayed the advice and directions of the justices upon the bench. But while this matter was depending, and probably in consequence of the doubts entertained by some of the bench upon the question, the statute chap. 4. of the 13th year of the queen was enacted, with a relation of effect to the beginning of her reign; and in Trinity term following a pluries elegit was awarded. The former writ and return were not recorded, by reason of the difference in the opinion of the justices; but a continuance was entered upon the roll by *comes non misit breve, &c.*

577 || If, in the case above cited, the *pendency of the writ* was a clear badge of fraud at common law, the sheriff ought to have returned the covin (20) upon the first elegit; but whether the case disclosed sufficient testimony of fraud seemed to be the doubt. What ground there was for the doubt need not now be be determined, though if that were necessary, it seems, that the *principles* of the common law, as now understood, would have warranted the jury in finding fraud upon the first elegit without the sanction of the statute 13 Eliz. It is very *clear*, however, that if the alienation had been subsequent to the judgment, the *precedents* at common law would have sufficiently authorized them in finding the covin, and no doubt can be ascertained, but that, under the statutes 50 Ed. 3. 6. or 3 H. 7. c. 4. if the debtor, before any writ taken out against him, had fled to a privileged place after a conveyance of his property in trust, execution might have been awarded and executed against him as if no such gift had been made. But since this statute 13 Eliz. the *pendency of a writ* has always been regarded as a consider-

378 able badge ||of fraud, and a ground for strict inquiry into the consideration by which a conveyance has been induced. Nor does it signify whether the suit is in Equity or at Law, for where a defendant made a conveyance to his son, prior to a *decree* in the court of chancery, but *pending the suit*, such

(20) Roll. Abr. 549.

conveyance was not suffered to defeat the subsequent decree.(21)

But after *judgment* has been obtained, a conveyance by a defendant of his goods or chattels has always been looked upon as wearing a very deep complexion of fraud *(g)*; and as subjecting to a very jealous examination ‖the case both of 579 the alienor and alienee. Thus it has been determined, that if the buyer have *knowledge* of the judgment (*h*) against his vendor, notwithstanding a full price was given, the sale is void, and within the purview of the statute 13 Eliz. (22). And where in the court of Chancery, A. being decreed to deliver possession of a house, or pay a sum of money to B. by a certain time, conveyed the house to a creditor, *in satisfaction of a real debt by bond*, this was not suffered to defeat B. of the benefit of the decree (23): in other words, the creditor in equity might have had a sequestration of the lease *(i)*. Conusors of

(*g*) By the case of Turvil v. Tipper, Latch. 222. it appears, that where a *bailiff of a manor*, in answer to an action of trespass for distraining goods, justified by virtue of his authority, and that by his precept he was commanded to distrain the goods of A. which goods came to the hands of the plaintiff by color of a fraudulent gift of them to the plaintiff; on issue whether the sale was made *bona fide*, it was found for the plaintiff and adjudged for him, although it was objected that he being *no creditor*, could not take advantage of the statute. The reason of which resolution was, that if a bailiff should not be aided by 13 Eliz. c. 5. because he is not a creditor, no mesne process could be executed; and when a statute gives the *principal* it gives all the *accidents*. Vid. Vin. Abr. tit. fraud. F. pl. 11.

(*h*) But it seems clear, that if a man purchases for a full price, *with notice* that his vendor is indebted by bond, his title will not be affected by such debts in equity. He need look no further than his title; and the bond-debt is no part of his title till it is placed on the land by a judgment. So also if a man purchases the land for valuable consideration from the heir, with notice of the ancestor's bond-debts, it seems that such bond-debts will not affect the purchaser in equity, so as to make him liable for the application of the purchase-money. Gilb. *Lex Prætoria*, 293.

(21) 1 Vern. 459. Goldson v. Gardiner, cited in Self v. Maddox.

(22) Vin. tit. Fraud x. pl. 3. Dougl. 88. (23) Vern. 460. Self v. Maddox.

(*i*) And yet a sequestration upon a decree is only personal process, and does not affect the land immediately as an extent upon a judgment does; the contempt is the foundation for the sequestration, for the decree acts only against the person; vid. ca. Temp. Talb. 223. 1 Ves 496. 2 P. Wms. 621. There are cases at law where a defendant attempting to discharge himself of a *personal* liability *arising* from *property*, has been frustrated by this act of

‖statutes and recognizances are not, as before has been observed, in a predicament to raise the question upon this statute in respect to their alienations of their fee simple lands (24); for their fee simple possessions, of which they were seised on the day of their becoming bound, or at any time since, remain liable to their debts, into *whose hands soever* they may come (25). And
581 it appears in *Lord Anderson's* case (26), that, by ‖the 33 H. 8. c. 39. the lands in *tail* of debtors to the *king* by judgment, recognizance, obligation, or other specialty, remain liable to such demands in the hands of the heir in tail. In *all* cases the bond to the crown has the force of a statute staple; and by the statute 13 Eliz. c. 4. the accountants and officers of his majesty, therein enumerated, are made liable to the payment of their debts to the crown in the same manner as if they were bound in a statute staple. A felon or traitor, after the felony or treason committed, and before conviction, may sell *bona fide* for his subsistence his chattels real or personal. And it seems, that whether the debtor is bound by specialty statute or recognizance, or subject as an accountant to the crown (27,) a sale of his chattels *bona fide*, after judgment and before execution, delivered *(k)* to the sheriff, is good and unavoidable (28).
582 It has been frequently held that if a man alien his ‖lands, with intent to commit a *forfeiture*, and afterwards is guilty of felony, the lands shall be forfeited (29). And it seems, that if the conveyance be plainly voluntary, and the commission of

Elizabeth. As where an heir before 3 & 4 W. & M. c. 14. aliened by covin before the writ purchased, if the covin was found, the heir continued liable because the land continued assets. Dyer, 148, b. note. And if in debt against an assignee for arrears of rent, defendant pleaded an assignment before the rent was in arrear, the lessor might reply that the assignment was made by fraud to defeat the plaintiff of his action for the rent, and if the covin was found the plaintiff must have judgment for his rent notwithstanding the assignment, though such assignment was a legal act. Sir Thomas Jones, 109. Sir Thomas Raym. 303.

(24) Vid. supra 462. (25) 3 Rep. 12. (26) 7 Rep. 21.
(27) 8 Rep. 171.

(*k*) Vid. stat. 29 Car. 2. c. 3. § 16.

(28) Dalt. Sh. Execution Stat. 127. (29) Vid. Roll. Abr. 34.

the crime whereby the forfeiture is incurred follow shortly after the conveyance, the inference of fraud is incontrollable. Thus if a man make a feoffment of his land, to the use of his son, and not upon communication of marriage, and ten days afterwards commit treason of which he is attainted, this settled land shall be forfeited to the king; for the feoffment shall be adjudged fraudulent and void as to the king (30); but where such feoffment was made in pursuance of an agreement entered into a year before, whereby it had been agreed that in consideration of a settlement made by his wife, in such manner, the feoffor should make the settlement upon his son as therein mentioned, the conveyance was held good against the crown (31). In *Pauncefoot's* case (32,) the word *forfeitures* in the statute 13 Eliz. c. 5. was holden not to be restricted in sense to forfeitures of obligations and recognizances, &c. (as by some was ‖maintained 583 to be the proper construction of the statute, the word *forfeitures* being placed after the words *damages* and *penalties*) but to extend to every thing which by law can be forfeited to the king or to a subject. And in *Jones* v. *Ashart* (33,) it was holden by Chief Justice Holt, that a bill of sale of all his goods made by a man in Newgate for a robbery, by way of provision for his son, the donor being afterwards convicted and executed, was fraudulent; for though a sale *bona fide*, and for valuable consideration, would have been good, because the party had a property in the goods *till* conviction, and was entitled to be sustained out of them, yet that such a conveyance was fraudulent at *common law*, for it could not be intended to be made to any other purpose, than to defraud the crown.

Thus also in the case of *Sir Walter Raleigh* (34,) who being possessed of a term of one hundred years, and intending to purchase the reversion in fee of the land, conveyed his term to his eldest son to prevent its being drowned, and afterwards purchased the fee, and ‖a long time afterwards was attainted of 584 treason, it was adjudged that the king should have the land in possession *discharged* of the lease, although *no fraud* was found in the case, but rather the contrary; but as it appeared

(30) Vid. Vin. tit. Fraud. A. 1. pl. (31) Id. ibid.
(32) Lane, 44, 45. 3 Rep. 82. (33) Skin. 357. pl. 4. (34) Lane, 48.

upon evidence that Sir W. took the profits of the land, and held courts in his own name till the attainder, and as such assignment was apparently in trust, it was holden to be fraudulent and void as against the king. And in *Ford* v. *Sheldon* (35,) it was holden that, where a man, who was a recusant or chargeable to the king for a forfeiture, took recognizances in the names of others, all such recognizances after the 13 El. should be *presumed in law* to be taken with intent to defeat the king of his forfeiture; and that by the common law such attempt to defraud the king was void, whether the forfeiture accrued by act of parliament or by common law.

But the title of the crown which, as appears from what has gone before, has the full advantage of this statute in defeating all collusive transactions, is not to be affected in its turn by
585 any constructive fraud in its ‖own officers by delaying execution, or in suffering a continuance of possession in the debtor, for *rex fallere non* vult *falli autem non* potest. Even actual collusion between the officers of the crown and the debtor, cannot deprive the crown, as against third persons, from having its execution perfected according to its title, which accrued from the teste of the writ.

In *Twyne's* case, as it is reported in Moore (36) by the name of *Chamberlayne* v. *Twyne*, the following circumstances are enumerated as badges of fraud: 1. The deed of gift was general, without any exception: 2. It was antedated, and direction was given to the attorney to use his skill to prevent its being defeated: 3. The making and sealing it was in the absence of the donee *(l)*: 4. It was agreed to be kept secret: 5 The donee never had possession of the deed, but it was kept by
586 the brother of the donor (*m*): 6. The ‖donor himself had the use of the goods, dwelt in the house, bought and sold, killed the cattle, changed them, and spent the corn in his family; and all this was colored by an account made out annually, between the donor and donee; but no money was actually paid to

(35) 12 Rep. 1. (36) Moore, 638.

(l) Vid. Lane, 44. id. 102. The definition of covin in Plowd. 54. seems too narrow.

(m) Vid. Finch. Rep. 270. Oakover v. Pittus.

the donee: 7. The donor, after the deed, being assessor, assessed *himself* to the subsidy seven pounds; whereas, if the deed was good, he had nothing: 8. The donee took out an extent upon a statute afterwards, against the goods of the donor, for a debt owing to him. And for these reasons, according to *this* report of the case, the deed was adjudged fraudulent.

SECTION IV.

‖It seems safe to affirm, that in general, where a thing 587
is by law forbidden to be done, the prohibition extends to every circuitous mode of effecting the same; for *dolus circuitu non purgatur*, and what cannot be done *de directo*, ought not to be done *per obliquum*. Thus in the case of *Magdalen College* (1,) it was said by the Chief Justice, that if one who intends to sell his land, conveys it by deed inrolled to the king, with intent to deceive a purchaser, and afterwards sells the land to another for valuable consideration, and makes a conveyance accordingly; in that case the purchaser shall enjoy the land *against the king*, by virtue of the statute 27 Eliz. c. 4. for the act being general and made to suppress fraud, shall bind the king. And if tenant in tail (2) be seised of land, with remainder over in tail or in fee, and he in remainder knowing that the tenant ‖in tail 588
intends by recovery to bar the remainder over and alien the land, in order to deprive the tenant in tail of his birth-right, and of the power which the law gives him of barring such remainder, and in order also to deceive the purchaser, grants his remainder to the king by deed inrolled, and afterwards the tenant in tail, for a valuable consideration, aliens the land by common recovery and dies without issue, the purchaser shall enjoy the land against the king by the said statute 27 Eliz. the words of which are that "every conveyance, &c. made, &c. to the intent and of purpose to defraud and deceive any purchasers, &c. shall be deemed only against such purchasers, &c. to be utterly void;" in which

(1) 11 Rep. 74, a. (2) 11 Rep. 74, b.

words, says the report, it is to be observed that such former fraudulent conveyance, is not only restrained, when made by the *vendor himself*, but *generally* that every conveyance, made of purpose and with intent to deceive a purchaser, shall be
589 void *(a)*. And ||therefore the conveyance of the remainder to the king of purpose and with intent to deceive a purchaser, is directly within the words and purview of that act; and of such opinion, says the great reporter, was Popham, Chief Justice, openly in the exchequer chamber; for the king shall never be made an instrument of deceit, *et cum sit author juris, non debet inde injuriarum nasci occasio unde jura nascuntur.*

Fraud may be passive as well as active: thus it was said in the margin of *Verney's* case, in Dyer's reports (3,) that where there was judgment in debt against A. and he suffered himself to be outlawed in felony with intent to defraud his creditor, and afterwards purchased a pardon, and had restitution, the plaintiff, nevertheless, had his execution for the manifest fraud *(b)*. Thus, too, all fraudulent judgments and executions are within the
590 statute 13 Eliz. and it seems clear that ||such covinous and circuitous proceeding are void by the common law (4.)—The abuse of the process of law to the purposes of fraud is a great aggravation of the offence. Nor shall any man avail himself, as it seems, of the operation, consequence, or conclusion of law upon his acts, to defeat his fair creditors. Thus it was the opinion of Lord Hale, that if a tenant for life, being indebted, with a view to defraud his creditors, commits a forfeiture, in

(a) The reader will apply this comment to the discussion of the point in page 377. et seq.

(3) Dyer, 245, b. Beverly's case.

(b) The law seems now to be that the king's pardon shall enure for the benefit of creditors. And it seems that an *attainted* person may be served with process while in prison at the suit of his creditors. Though it formerly used to be a trick for persons greatly indebted to procure themselves to be indicted for some crime within the benefit of clergy, in order to defeat their creditors by pleading that they were attainted. Vid. Dyer, 245, b. 1 Wils. 217. 1 Blackst. 30. 1 H. Blackst. 129.

(4) Vid. Brook. tit. Covin & Collusion.

order that the reversioner, who is privy to the contrivance, may enter, the creditor shall avoid the *forfeiture* as well as any fraudulent *conveyance* (5).

SECTION V.

‖ The construction of these statutes of fraudulent con- 591
veyances has always authorized the party seeking the benefit of them to treat the fraudulent gift as *void*, so that the case, as to him, is the same as if no such gift had been made (1).* And

(5) 1 Vent. 257.

(1) Vid. Dyer, 295.

* The intention of law-makers may be collected from the cause or necessity of the act, and Statutes are sometimes construed contrary to the literal meaning of the words. It has been decided, that a thing within the letter was not within the statute unless within its intention. The letter is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter. 4 Bac. Abr. title Statute J. S. 38, 45, 50. The object of the Statute appears from the title to be the prevention of frauds and perjuries, and although it is said that the title forms no part of the act, (Ld. Raym. 77,) yet the reason of this dictum seems to be the practice of parliament, by which the title is prefixed to the statute at the discretion of the clerk of the house in which the bill originated. The title is framed in the same manner as the bill, and is sanctioned by both branches of the legislature; we may, therefore, treat it as explanatory of the object of the law, and it may be safely said that the object disclosed by the title does not render it necessary to treat a deed as utterly void against the grantor, or against strangers who have no interest, claim, or demand, either on the property or on him who conveyed it. The same inference may be drawn from the language of the section, which declares a conveyance, &c. made to defraud *creditors* or purchasers, to be utterly void. Why should it be void? Because it operates as a fraud on the *persons named*, not upon strangers, who have no interest in the transaction, nor on the maker of the deed, who is the principal or only agent in the fraud. The intention of the act, then, seems to be to protect creditors and purchasers, and to effect this purpose it cannot be necessary to extend it to any other description of persons. Every statute should be construed with reference to its object, and the

this appears from all the pleadings upon these statutes. Thus in the case of *Leonard* v. *Bacon* (2), where the tenant pleaded non-tenure to a formedon, upon which the parties were at issue, and it was found that before the writ purchased, the tenant had enfeoffed divers persons, to the intent to defraud those who had cause of action for the same lands, and notwithstanding such his feoffment, continued to receive the profits; the demandant had judgment by virtue, as was said, of the statute 13 Eliz. c. 5. So in the *lex prætoria* (3) it was said, that "where a man makes a voluntary conveyance, with power of revocation, and afterwards contracts ||bond or other debts, which only bind the person, such creditors suing the debtor to judgment shall extend the lands *in the hands of the voluntary conveyor*, and

592

will of the law-makers is best promoted by such a construction as secures that object and excludes every other.

Although the principles of the common law are strong against every species of fraud, yet we find it decided in Twyne's case (3 Rep. 83) that an estate made by fraud can only be avoided, at common law, by him who had prior right, title, or interest, debt, or demand, and not by one whose right was more puisne or subsequent to the conveyance. The common law of which the statute is said to be declarative, professed to protect creditors, purchasers, and those having right. It did not extend its care to trespassers or to persons pretending claim without right. This was the scope of the common law, and it shews that the mischief to be remedied by the statute was difficult of proof, and the frauds that might be successfully practised on persons having right, title, interest, debt or demand accruing after the conveyance. Neither the condition of strangers or persons without right or demand, nor the safety of the fraudulent grantor, entered into the consideration of the common law, nor did their case constitute any part of the mischief to be remedied.

In the case of Anderson v. Roberts, 18 Johns. R. 515, and cases their cited, fraudulent deeds are treated as voidable only by the parties aggrieved. If the deed be literally a nullity the parties stand as though it never had been executed; the title remains in the fraudulent grantor and he may shew his own fraud to avoid his deed. If on the other hand the title passed from the grantor without vesting in the grantee, it would be either extinguished or in perpetual abeyance, so that no one could question the title of him who might be in possession though without color of title. Such a state of things could not have been the design of the framers of the law. It is clear that the title would pass to the grantee subject to the right of creditors or purchasers, but not liable to be questioned by strangers and persons having no claim.

(2) Cro. Eliz. 238. (3) Page 203.

make a title in an elegit to the lands in *his* hands, notwithstanding such voluntary conveyance."

But it should be observed, that where a man, being indebted to simple contract creditors, makes a plain voluntary conveyance of his real property, and dies before his creditors have obtained judgment against him upon such debts, the creditors cannot follow the land with their executions; for as such debts do not bind the heir, but merely the personal assets, such creditors would gain nothing by avoiding the voluntary conveyance of the ancestor, since if the lands were construed to descend upon the heir as assets, they would not be assets to satisfy demands upon simple contract. And whether judgment were obtained or not in the lifetime of the ancestor, would cause the diversity as to this point. But wherever a man makes a fraudulent gift of his goods or chattels and dies indebted, the rule upon the 13th Eliz. c. 5. has always ‖been to construe the gift as utterly void 593 against all his creditors, and the debtor to have died in full possession with respect to *their* claims, so that the effects are just as much assets in the hands of the personal representative as to creditors, as if no such attempt to alien them had been made; and this was the point secondly determined in *Bathel* v. *Stanhope* (4).

To give substantial effect to this construction of law, the voluntary donee is considered as liable to be charged as executor *de son tort* if he take possession of the goods after the decease of the donor (5). And though regularly there cannot be an executor *de son tort*, when there is a rightful executor (6), or when administration has been duly granted, (for if after probate or administration granted, a stranger take possession of the goods of the deceased, he is a trespasser to the executor or administrator, and may be sued as such,) yet it appears by the case of *Hawes* v. *Leader* (7), that if such donee of a fraudulent gift demand and obtain possession ‖of the goods after the 594 death of his donor, and after administration granted to another, he is yet liable as to such goods of the deceased to be

(4) Cro. Eliz. 810. (5) Cro. Jac. 271. Yelv. 197. 2 Leon. 223. per Dyer, C. J. and see Edwards v. Harben, 2 T. R. 587. (6) 5 Rep. 33 Salk. 313, pl. 19.
(7) Cro. Jac. 271. 3 Leon. 57.

charged by the creditors as executor *de son tort*. And this seems to be a rule much in favor of the rightful administrator or executor, who cannot excuse himself upon the statute 13 Eliz. from delivering up the subject of his testator's or intestate's fraudulent gift to the donee if he demand it. Though it seems, that still, if the donee, without demanding the goods given to him by the deceased, take possession of them by his own act, *after* probate or administration granted, he is a trespasser to the executor or administrator, who have their remedies (8) against him for the recovery of the goods taken; and perhaps, in such a case, the creditors ought to treat them as assets in the hands of the rightful executor or administrator: for such seems to be the rule in *Bethel* v. *Stanhope*, above cited. But, wherever the donee takes possession after the death of the donor *before* 595 any probate or administration granted, ||as was the case in *Edwards* v. *Harben* (9), he is clearly and regularly an executor *de son tort*, and liable to the demands of creditors as such (10).

If a *chattel real* be the subject of the voluntary and fraudulent gift, the rule of construction which attaches the thing so fraudulently given away to the assets of the deceased as parcel of his estate, will equally apply. Thus where A., (11) being indebted to B., made C. his executor and died, and C. the executor, promised B. that if he could discover any assets, parcel of the testator's estate at the time of his death, then he should have his debt satisfied thereout, and the question was, whether a *lease for years* conveyed to a stranger by the testator in his lifetime fraudulently, should, in law, be *parcel* of his estate at the time of his death or not, it was by the whole court resolved to be parcel of the estate of the testator at the time of his death.

(8) Cro. Eliz. 810. (9) 2 T. R. 587. (10) Wilcox v. Watson, Cro. El. 405

(11) 2 Roll. Rep. 173.

SECTION VI.

|| With respect to real estate, Lord Coke lays it down as a rule in *Fermor's* case (1) that a covinous conveyance to prevent assets from descending is nothing worth. Therefore in an action of formedon where the warranty with assets descended was pleaded in bar, and the demandant replied '*reins per descent*,' and the jury found a fraudulent feoffment to prevent the descent, the assets were considered to have descended, notwithstanding the feoffment. (2) And, according to the greatest authorities, a *covinous* conveyance of land is *no* conveyance *as against* the interest intended to be defrauded, and ought, by the rules of good pleading, *so* to be treated, where a party is seeking to avail himself of the protection of the statutes of fraudulent conveyances, for the maxim is "*pro possessore habetur qui dolo desiit possidere.*"

|| Thus in the case of *Humberton* v. *Howgil*, (3) H. re- 597
covered a debt against Thomas Howgil, who died, and upon a *scire facias* against the tertenants, the sheriff returned John Howgil tenant of a house in Yarmouth, of which Thomas Howgil deceased was seised at the time of the judgment; John Howgil came in and pleaded, that Thomas Howgil enfeoffed him long before the judgment, in fee, and traversed, that he was seised at the time of the judgment or at any time after; whereupon issue was taken, and the jury found the feoffment, but further said that it was made by covin to defraud the plaintiff and other creditors; the court, therefore, gave judgment for the plaintiff, for Thomas the ancestor remained *still seised as to the creditors*, notwithstanding the feoffment. But if the issue had been, *enfeoffed or not*, it must have been found, says the report, *against the plaintiff*, for it *was* a *feoffment* such as it was, and must have been answered, if the issue had been directly upon the feoffment, by pleading the covin specially: But here the issue was general *seised or not seised* by the feoffment, and therefore the covin might be given in evidence when the || feoffment was given 598

(1) 3 Rep. 78 b. (2) Dyer 295 b. pl. 16.

(3) Hob. 72. and see Chan. Rep. 131.

in evidence. The same mode of pleading was observed in *Leonard* v. *Bacon.* (4)

That such conveyance of land by the ancestor to defeat the claims of his specialty upon his real assets, is vain, and that, notwithstanding such conveyance, the lands remain, as to the bond creditors, *parcel* of his estate at the time of his death, is clearly laid down in the Touchstone, (5) which says, that, if a man a little before his death make a conveyance of his land to his children, with a proviso to make it void at his pleasure, and he take the profits of it as his own; or make a conveyance of it to friends, to the intent that it shall not be subject to the payment of his debts, *having bound himself and his heirs by any specialty*, or to the intent that a warranty and assets shall not bind his son for other land or the like; in this case the conveyance shall be void, as to those whose remedy is upon the land by descent.

599 But there is an opinion of Lord Macclesfield opposed ‖ to this doctrine. (6) That Chancellor is reported to have said, that by the statute against fraudulent devises, a man is prevented from defeating his creditors by his will; but that any settlement or disposition which he shall make, *in his life time*, of his lands, *whether voluntary or not*, shall be good against his *bond creditors*, for that was not provided against by the above-mentioned statute, which only took care to secure such creditors against any imposition which might be apprehended in a man's last sickness; but if he gave away his estate in his lifetime, *this prevented the descent of so much to the heir*, and consequently took away the remedy of the bond creditor against the heir, who was only liable in respect of the assets descended; and as a bond is no lien whatsoever on lands in the hands of the obligor, much less can it be so when they are given away to a stranger. This determination, however, has been considered as irreconcileable with principles and authorities. In *Brunsden* v. *Stratton*, (7) which came before the court of Chancery in the following year; Mr. Vernon said, that, till the resolution in *Parslowe* v. *Wee-*

(4) Cro. Eliz. 233. (5) Shepp. Touchst. 66.

(6) Vid. the case of Parslowe v. Weedon, Eq. Ca. Abr. tit. Creditor and Debtor E. pl. 7.

(7) Prec. in Chan. 521.

don, ‖ he should have been of opinion, that such disposition by a man in his lifetime as mentioned in that case was fraudulent against his creditors, and he quoted the case of *Templeman* v. *Beke*, tried before Lord Chief Justice Holt, wherein it had been so holden. Mr. Vernon's dissatisfaction with the opinion of the Lord Chancellor above mentioned, increased with his experience and reflection, as appears from what was observed by Lord Talbot fifteen years afterwards, in the case of *Jones* v. *Marsh.* (8)

Where an ancestor dies indebted by bond, and leaves assets to descend to his heir, and the heir aliens such assets to a *bona fide* purchaser for valuable consideration, the heir, at this day, remains liable to his ancestor's bond creditors, by reason of the assets descended, whether the conveyance were antecedent or subsequent to an action commenced, though before the 3 & 4 W. & M. c. 14. the debtor was without remedy, if the heir had aliened before the original writ was sued out. But still the alienation by the heir to a *bona fide* purchaser for valuable consideration, puts ‖ the *land* specifically out of the reach of the creditor's *execution*, though the heir remains *personally* liable upon the bond to the amount of the *assets descended.* But if the heir have made a *collusive* and *fraudulent* conveyance to defeat the creditor of his remedy upon the lands descended, such fraudulent conveyance is void by the statute 13 Eliz.; for where the heir is *expressly* bound with his ancestor, the law regards as his own debt, to the extent of the assets descended, and the writ against him is in the *debet*, (9) as well as *detinet*; so that he is in the predicament of a person making a voluntary conveyance to defraud his own creditors. It is not, indeed, necessary that it should be the proper debt of the person making a conveyance to bring the case within that statute, since if an executor *not named* in his testator's bond, make a fraudulent conveyance of the personal assets, the creditors of the testator shall avoid such conveyance by virtue of the 13 Eliz. c. 5.; (10) the rule upon which statute, as to this point, seems to be, that by such fraudulent conveyance nothing passes, as to creditors, out of the ‖ grantor, but that the 602

601

(8) Cas. temp. Talbot 64.

(9) 2 Leon. 11. per Dyer. Brook. debt 238. Plowd. 441. Poph. 155.

(10) Cro. Eliz. 405.

property, though effectually conveyed to some purposes, remains as assets in the hands of the representative to answer the demands of the ancestor's creditors.

Thus in *Gooch's* case, (11) a creditor brought an action against the heir upon the ancestor's bond, to which the defendant pleaded *reins per descent;* the plaintiff replied that he had assets at I. in the county of Suffolk; and at *nisi prius* before Wray, Chief Justice, one of the counsel gave in evidence for the plaintiff, that the defendant's father was seised of the lands at I. in fee simple, and died thereof seised, and that they descended to the defendant, by which, &c. All which was admitted on the other side; but it appeared in evidence for the defendant, that a long time before (*a*) the action was brought, the defendant had enfeoffed one G. W. in fee of the lands, which was also confessed; but it was moreover alleged and proved by the plaintiff's counsel,

603 that the feoffment by the defendant was made || by covin to defraud the plaintiff of his action, and was therefore void by the statute 13 Eliz. c. 5. as to the plaintiff; and judgment was given for the plaintiff by the court, after it had been resolved by the Chief Justice that the fraud was proper to be given in evidence, without being *specially* averred, upon the general question on the pleading in that case, i. e. *whether assets or not.* (*b*)

In the case stated in the margin of Dyer's reports, (12) where R. brought an action of debt against B. upon his ancestor's bond, who pleaded *reins per descent*, at the day of the writ purchased, (which was a good defence before the statute 3 & 4 W. & M. c. 14.) it being found that *before* the writ was sued out, the heir had aliened the assets by *covin* to defraud the plaintiff of his remedy, judgment was given upon the general plea for the plaintiff; and it was resolved that it was well found for him upon the inquisition of assets by descent.

604 || And in the anonymous case reported in the same page of Dyer, in which debt was brought against the heir upon the bond of the ancestor, it was stated to be the opinion of Brook

(11) 5 Rep. 60. (12) Dyer 149. a. note (80.)

(*a*) Since the statute 3 & 4 W. & M. c. 14. s. 6. this defence cannot avail.

(*b*) The mode of pleading in this case was agreeable to the principle in Humberton v. Howgil, Hob. 72. and Leonard v. Bacon, Cro. Eliz. 233.

that, at common law, (*c*) if the alienation were found by inquisition upon the elegit, to be made, pending the writ, by covin, and this returned by the sheriff, a new writ of elegit should issue reciting the covin, &c.

To understand which opinion of Brook it must be remembered that since the statute 3 and 4 W. and M. c. 14. supposing fraud to be out of the question, the heir indebted upon his ancestor's bond may alien the assets descended, so as to put them *specifically* out of the reach of the specialty creditor, and that before the said statute of W. & M. such alienation before the writ sued out, not only gave a good title to the purchaser, but entirely destroyed the plaintiff's *remedy* by discharging the person of the heir, who might plead ‖ that he had no assets descended *at the* 605 *time of the original writ sued out.* By the direction of the statute 3 & 4 W. & M. the jury are to inquire of the *value* of the assets descended, where the plaintiff by his replication brings himself within that statute by replying to the plea of *reins per descent* that *before* the day of the writ the defendant had assets by descent in fee simple, and the judgment is to recover *pro tanto*, with respect to the value of the assets; but at common law, where the defendant pleaded *reins per descent* on the day of the writ purchased, and it was found against him, the judgment was *general, (d)* and a general execution ‖ was awarded against 606

(*c*) The case was adjudged in T. T. 3 & 4 P. & M.

(*d*) This was said by Holt C. J. to have been always holden for law, since the case of Davie v. Pepys, Plowd. 440. Vid. 2 Lord Raym. 786. So also, the judgment was *general* if given by default, *nil dicit*, or by confession, against the heir, or upon any ground or matter whatsoever without a confession of the assets descended, and the certainty of them being shewn, vid. Moore, 522. Cro. Eliz. 693. 2 Leon. 11. in point, and see Rast. Entr. 172. b. pl. 5. And in such case the court could not give a special judgment, unless the plaintiff assented to it, and then they might. 2 Roll. Abr. 91. and it seems that Leuson's case in 1 Dyer, fo. 80. b. which is contrary to these authorities, cannot be law.

But by the statute 3 & 4 W. & M. c. 14. where judgment is given against an heir, in an action on his ancestor's bond, by confession of the action, without confessing the assets descended, or upon demurrer or *nihil dicit*, it shall be for the debt and damages generally, without any writ to enquire of the lands, tenements, or hereditaments, so descended, Carth. 354. But if the heir plead *reins per descent*, and the plaintiff reply according to the statute 3 & 4

the lands and tenements of the heir, as of his proper debt, without saying in the writ, *of the lands which he had on the day of the judgment given*; for the ancient form of the elegit, was without limitation of time; and upon a special return of the sheriff that the defendant had no lands or tenements, but had aliened whatever he had, a new writ of *elegit* with a *testatum est* that he had assets pending the writ, issued to the sheriff wherein he was
607 commanded || to extend what the defendant had on the day of the *jurata*, i. e. the day of signing the judgment, because the day of the *jurata* and the day in bank were the same day in law. So that the sheriff could only, where there was no covin, extend upon this *testatum elegit*, the *descended lands* or real *assets*, which were unaliened by the heir at the time of the judgment, by which at common law the lands were bound by relation, *(e)* from the first day of the term in which it was signed; though the defendant still continued not only personally liable to the extent of the assets descended, but liable *de bonis propriis* for the whole debt by reason of his false plea of *reins per descent*. (13) But where the alienation was returned by the sheriff, upon the first general elegit to have been made by covin, Brook seemed to think that not a *testatum elegit*, but an *elegit de novo* should issue; for in such case the defendant ought to be
608 considered as still *possessed* of all || the assets descended, even at the time of the judgment, since his fraudulent alienation was *no* alienation as to creditors. And it should seem, that, since, wherever the plaintiff by his replication elects to have his remedy by the statute 3 & 4 W. & M., *(f)* he *can* only have

W. &. M. that the defendant had assets by descent *before* the writ or bill sued out, the judgment and execution *must* be special, and the jury are to enquire of the *value* of the lands descended, and there can be no *general* judgment in such case against the heir, as at common law, for his false plea.

(e) Vid. 29 Car. 2. c. 3. s. 14, 15. by which the relation of judgments to the first day of term is altered with respect to *bona fide* purchasers, who are only affected by the judgments of their vendors, from the time of the signing such judgments.

(13) Brook. Assets per Descent, 5. 6 Co. 47. 2 Roll. Abr. 70. Sty. 288. per Roll. c. 9.

(f) The statute gives no occasion to alter any more of the form of the replication which was before used, than merely as to the time when the assets descended, vid. Redshaw v. Hester, Carth. 353. 5 Mod. 122. S. C.

judgment for the *value* of the lands descended, if he would take advantage of the statute 13 Eliz. c. 5. against a fraudulent alienation by the heir to a confederate purchaser, he would do better to reply *as at common law*, in order that upon the *general* judgment the *descended lands themselves* might be extended in the hands of the alienee as being *still in the possession of the heir as to the demands of creditors*, and then the covin, *(g)* might be tried in an action against the sheriff by the purchaser, or if the sheriff returned the alienation by the heir, he would be liable to an action for || a false return, which would bring the ques- 609 tion of fraud before a jury. *(h)*

(g) But there is evident risk in relying upon the covin, for if the plaintiff waives the benefit of the statute, he is answered at common law by an alienation *bona fide* before the suit commenced.

(h) In equity, where an heir liable upon the bond of his ancestor, before any suit commenced upon the bond, conveyed away the estate to a purchaser, it was doubted whether, upon a bill brought against the heir for a discovery of assets, and to subject money raised by the sale, relief ought to be granted; but upon the heir's pleading alienation before the original filed, the Lord Keeper ordered him to answer, saving the benefit of his plea to a hearing, vide Goffe v. Whalley, 1 Vern. 282. In Sagittary v. Hide, where the heir sold the lands to a purchaser before any suit commenced, though the purchaser had notice of the bond, the court would not treat part of the purchase money which remained in the hands of the purchaser not yet paid over as assets to satisfy the plaintiff, who was a bond creditor of the ancestor. But where there has appeared to be collusion between an *executor* and a purchaser, the court of chancery has followed the assets specifically; as in Crane v. Drake, 2 Vern. 616. where there being express notice of a debt of the testator still unsatisfied, and a contrivance between the purchaser and executor to defeat such claim, Lord Chancellor Cowper said, that the purchaser was a party to and contriving a *devastavit*, and affirmed the decree at the Rolls for the plaintiff. But in Nugent v. Gifford, 1 Atk. 463, where the purchaser from the executor was not chargeable with any notice or collusion, the court would not disturb his enjoyment. And it seems according to Paget v. Hoskins, Gilb. Eq. Rep. 111. that wherever an executor || or administrator disposes of the assets 610 without valuable consideration, there the creditors, or whoever is entitled under the statute of distributions, may pursue the assets in equity, for the disposition is fraudulent within the principle and policy of the 13 Eliz. and they are still to be regarded as if they were in the hands of the personal representative. But if they are sold *bona fide* and for *valuable consideration*, they shall not be followed, because it is the province and duty of the executor to make the most of the assets, and nobody would buy if a purchaser *bona fide*

were subject to the demands of creditors. And general notice that the goods or chattels are testamentary property is of no prejudice to the purchaser's title. vid. Ewer v. Corbet, 2 P. Wms. 149. In addition to this class of beneficial determinations, by which the protecting aid of a court of equity has erected a barrier against collusive dealings between purchasers and executors or administrators. it may be useful to direct the readers's attention to the case of Doran v. Simpson, very lately decided in chancery, vide 4 Ves. jun. 651. whereby it appears that "where *creditors*, or *next of kin*, can state a case, that the representative is colluding with the *debtors* of the estate, and diminishing the fund, they have a right upon that ground of collusion to make the debtor a party to obtain a discovery, and upon that discovery to attach upon the money, and to prevent the payment of the money, or a settlement of the account, by collusion between the representative and the debtor."*

* Sheldon v. Woodbridge, 2 Root, 473.

CHAPTER VI.

SECTION I.

NOTHING has yet been said respecting that clause of the statute 27 Eliz. c. 4. which respects *fraudulent powers of revocation.* The present chapter is therefore assigned to that subject. But it may be an assistance to the reader to lay before him the words of that clause, which seem sometimes to have been interpreted with a misconception of the meaning of the legislature. "And be it further enacted by the authority aforesaid, That if any person or persons have heretofore since the beginning of the queen's majesty's reign that now is, made, or hereafter shall make any conveyance, gift, grant, demise, charge, limitation of use or uses, or assurance of, in or out of any lands, tenements, or hereditaments, with any clause, provision, article or condition of revocation, || determination or alteration, at his or their will 612
or pleasure, of such conveyance, assurance, grants, limitations of uses or estates of, in or out of the said lands, tenements, or hereditaments, or of, in or out of any part or parcel of them, contained or mentioned in any writing, deed or indenture of such assurance, conveyance, grant, or gift; and after such conveyance, grant, gift, demise, charge, limitation of uses, or assurance so made or had, shall or do bargain, sell, demise, grant, convey or charge, the same lands, tenements or hereditaments, or any part or parcel thereof, to any person or persons, bodies politic and corporate, for money or other good consideration paid or given (the said first conveyance, assurance, gift, grant, demise, charge or limitation, not by him or them revoked, made void or altered, according to the power and authority reserved or expressed unto him or them in and by the said secret conveyance, assurance, gift or grant,) That then the said former conveyance, assurance, gift, demise, and grant, as touching the said lands, tenements, and hereditaments, so after bargained, || sold, conveyed, demis- 613
ed, or charged, against the said bargainees, vendees, lessees, grantees, and every of them, their heirs, successors, executors, administrators and assigns, and against all and every person and

persons which have, shall or may lawfully claim anything, by, from or under them or any of them, shall be deemed, taken and adjudged to be void, frustrate, and of none effect, by virtue and force of this present act."*

From what has been produced in an early part of this treatise the reader may think it pretty manifest that courts of law and equity have generally agreed in holding the ***voluntariness*** of a conveyance, exclusive of the operation of this fifth section of the act, strong presumptive evidence *at least* of the frandulent intent within the meaning of the 27 Eliz., though he be disinclined to a full acquiescence in the opinion of a great judge, *(a)* who has
614 said that every voluntary conveyance, ‖ followed by a subsequent conveyance for valuable consideration, though there be *no fraud* in that voluntary conveyance, yet, according to the determinations, such mere voluntary conveyance is *void at law*, by the subsequent purchase for valuable consideration. In consistency with this prevailing construction, a substantive and independent operation has been implicitly or expressly allowed to this part of the statute, which having declared by a distinct clause, and in direct terms, that the bare insertion of a power of re-
615 voking *(b)* ‖ at pleasure in a conveyance shall render it

* 3 Co. 826. Moore, 605. 2 Jon. 91, 95. 2 J. Ch. R. 565. 3 J. Ch. R. 3. 15 Johns. R, 571.

(a) 2 Ves. 10. by Lord Hardwicke; read also his Lordship's opinion to the same effect in White v. Sansom, 3 Atk. 412. and in Benet v. Musgrove, 2 Ves, 57.

(b) No conveyance at common law could have a power of revocation annexed to it: it was a repugnance which the common law would not endure. But a man might have annexed a condition to his feoffment, that if he tendered 12*d.* to the feoffee or his heirs, he might enter again upon the estate; so that the estate which was divested out of him by livery of seisin, might be revested in him upon the performance of the condition and *re-entry*. A common law conveyance with a power of revocation was void, as to all power of revocation, for repugnancy, and because a double power could not be seated in distinct persons over the same thing. These powers of revocation came in with the statute of uses; at least a legal power of revoking a legal conveyance; for by the statute 27 H. 8. c. 10. all those conveyances by way of uses, which carried only the equitable estate at common law, were converted into regular legal conveyances, so that, after this statute these powers remaining as they were, it became possible to convey a legal estate, and reserve a legal

void and of no effect against a purchaser for valuable consideration, has set up a definitive mark of fraud superseding, wherever it is found, all inference by general collection. Thus it was said by Winch, Justice, in the case of *Tyrer* v. *Littleton*, (1) that "if it be a fraud within the stat. 27 Eliz. *apparent*, that is, if it contain a power of revocation, || which is declared to be *ap-* 616 *parent fraud* by the statute, the court may take notice of that without any *averment.*" And it should be observed, that, notwithstanding some notions to the contrary, the introduction of such a power into a settlement or conveyance, operates by *vitiating* the instrument as to a subsequent purchaser, to the extent of the dominion reserved by such power, and not by any supposed statutory execution of the power itself in favor of such purchaser; for, as before has been observed, there would be a great inconsistency in making the reservation of such power at once the *fraudulent act*, and the *instrument* by which the fradulent act is defeated. The propriety of the construction here contended for is supported by the reasoning of the whole court in the case of *Bullock* v. *Thorne*, (2) where, between the first conveyance containing the power of revocation and the sale to the purchaser, the seller made a lease for years, and afterwards levied a fine to corroborate the lessee's interest, by which it was contended the power was extinguished; || whence the counsel proceeded 617 to infer that the vendor had no power to revoke at the time of the sale; and according to him, the operation of this clause of the statute was meant to be confined to cases where the ven-

(1) 2 Browl. 190. (2) Moore 616.

power of revoking the conveyance.

But it was observed by Baron Powell in Bath and Montague's case, that a simple power of revocation was as repugnant to a conveyance after the statute as it was before; but a power of revocation was let in to work as a *condition*, with this difference, that whereas the performance of a condition at common law would not work a revesting of the estate without a *re-entry*, after the statute of uses the performance or execution of the power transferred the estate to the new uses, or in other words revested the estate in him that had the power, without *re-entry*. But still there is a necessity for the power's being conformably executed, as much as there was of the condition's being performed at common law, for it is still in the *nature* of a condition. Vide Inglefield's case, 7 Rep. 39. Co. Litt. 237. a.

dor *had power* to revoke, and did *not* revoke; for, it was said, the statute made the conveyance *void* which *ought* to have been revoked, and supplied the duty of the party himself who ought to have revoked, and neglected so to do; but if the party was *unable* to revoke, there the statute had no means of avoiding the conveyance, because the party could not avoid it himself.

But the whole court rejected this reasoning, (*c*) which
618 seemed to them to be contrary to the *words* and || *intention* of the statute, and they recited the *words* to the following effect, "where any person makes a conveyance, &c. with any clause of revocation at his pleasure *mentioned* in the deed of conveyance, and afterwards bargains and sells, &c. the land for money, &c. the said conveyance not being revoked according to the power, &c. there the first conveyance shall be void against the purchaser;" and they said that if the case in question were examined by the letter of the statute it would be found to fall within it, in three particulars, viz. there was a power of conveyance *mentioned* in the deed; the conveyance was not revoked according to the power; the person making the conveyance afterwards bargained and sold the land to a purchaser for valuable consideration.

And they observed, that where these *premises* occurred, the statute drew the *conclusion*, viz. that the conveyance should be *void as against* the purchaser. And they thought that the extinction of such power of revocation before the sale, did not at
619 all affect the operation of the statute, for they said that although when the ||power is determined it is impossible for the conveyance to be revoked according to the power, yet that the statute makes the conveyance *void* against the purchaser; for the statute says, that if a man make a conveyance with power of revocation, and then sell the land for money, the conveyance not being revoked according to the power, the conveyance shall be *void*; and that to construe the statute as making the conveyance good against the purchaser, because the power

(c) The court argued *hypothetically* on the supposition that the fine levied by way of assuring the lease operated the extinction of the power. But as to the point itself, they were agreed, that, if a man having a power to revoke an use, make a lease for years, and levy a fine only as a further assurance of the term, without expressing any use, the power is only suspended during the term, and not extinguished. Vid. Moore, 618.

of revocation was extinct, would be to make it an encouragement and assistance to fraud; for that then a vendor might make a secret release of his power, or a secret feoffment, and might still be able to shew to the purchaser the conveyance containing the power of revocation, as an inducement to him to complete his purchase: for which reasons it appeared to the court that if the power of revocation be *mentioned* in the deed of conveyance, whether the power be put an end to or not by any intermediate act, the conveyance will nevertheless be *void* as against the purchaser.

‖In the same case, Walmesley, J., held it clear that a lease 620
for years made by one who has power of revocation, does not suspend the power if created by *way of use*, but he may execute it as to the reversion expectant upon the term, though it was otherwise with respect to a *condition* annexed to *an estate in possession*. So that, applying that doctrine to the principal case, the lease there made by the seller before his conveyance to the purchaser was no hindrance to the execution of the power as to the reversion. And he cited a case, which had been adjudged since the statute 27 Eliz. c. 4. in the King's Bench in the time of Wray, C. J. where, a man having made a conveyance with a power of revocation to be executed *at a day to come*, and before the arrival of the day having conveyed the land to a purchaser, the first conveyance was adjudged void; and the reason was, that although *at the time of the purchase* the vendor had no power to revoke, yet there was a power of revocation *mentioned* in the first conveyance. But he added, that the conveyance should not be void against the purchaser *before* the time limited ‖for the revocation, but *after* 621
that time it should be *utterly void*, because it was subject to be revoked from that time.

The sense of the court appears clearly from the tenor of the argument as above stated, to have been, that the *insertion* of such a power of voluntary revocation, makes the deed *ipso facto* void against a subsequent purchaser, without any supposed statutory execution of the power; and that in fact the whole deed, power and all, is *void* as against a purchaser for value, by reason of the fraudulent reservation; and though it was said by Walmesley, and admitted by Anderson and Kingsmill, that a deed

containing a power of revocation reserved to be executed at a *future day*, could only be avoided by a subsequent sale from the day when the power was exerciseable, which may look a little at first like an intimation that the power was to be *instrumentally* efficacious in the destruction of the interest raised by the first conveyance; yet, upon considering the matter more attentively,

we observe, that at the time of the second conveyance,
622 when the power, ‖according to such a doctrine, must have

received its prospective execution, it was neither *in esse* nor in capacity to be executed. But the truth seems to be, that the defeasance of a conveyance, as against a subsequent purchaser, produced by the 5th section of the 27 Eliz. can only co-extend with the dominion of the power; and there is nothing in such a suspended power to prove that the conveyance may not have been for valuable consideration up to the period when it was to become revocable at the pleasure of the grantor. But though, in the case of such future power of revocation, the presumption of fraud dates only from the moment in which the conveyance becomes revocable, yet the statute, which does not work by the instrumentality of the power, enables a purchaser from the

grantor, *before* the power is in capacity to be executed *(d)*
623 ‖to avoid the prior conveyance containing such power, from

the period of its practical existence. Such seems to be the extent of the avoidance consequent upon the insertion of a voluntary power of revocation in a conveyance by virtue of the 5th section of the act 27 Eliz. but there can be no doubt but that, where the immediate interest conveyed until the future power is limited to arise is merely voluntary, or where the future power is contained in a conveyance moving *wholly* upon gratuitous con-

(d) The *original* suspension of a power reserved to be executed on a day to come is very distinguishable from the suspension of what was originally a present power arising *ex post facto* by the subsequent creation of a term of years by the party to whom the power was reserved, and which is nothing but a parital execution of the power. Vid. Moore 612, 613, 614. In the case last supposed, the grantor may presently exercise this power over the reversion expectant upon the particular interest previously set up by him; and there the *operation* merely, and not the *execution* of the power, is suspended. In the first case, the power is not *practically* existing even in prospective interest before its appointed time arrives.

siderations, the subsequent purchaser for value avoids the *entire* conveyance.

If, by way of following up the application of these principles, we suppose a man seised of land in fee simple to make a feoffment to the use of A. B. for twenty-one years, reserving rent, and afterwards to ||the use of C. in tail, with remain- 624 der over, with power in the grantor to revoke, at the expiration of the lease, all the succeeding uses, and afterwards, while A. B. is in possession of the land, to enter with his consent (3,) and enfeoff a third person with livery of seisin for a valuable consideration given; it seems clear that the second feoffment would not operate under the statute as an execution of the power, for the truth is, that it would work an *extinction* of the power, according to *Albany's* case (4); and so far from operating by *force* of the power, the power or future use would be carried away *inclusively* (5) in the livery; for such future power is only a right of an use, and all rights and uses are swept away together by the feoffment. But such second feoffment would still prevail against the former feoffment by virtue of the 5th section of the statute 27 Eliz. and it could only prevail in the same manner as a subsequent conveyance for value *bona fide* prevails, by virtue of the *first* clause of the statute, against a prior voluntary and fraudulent conveyance, *i. e. mutatis mutandis*, by a *radical avoidance* from ||the time when the 625 former conveyance was subjected to the power. But if the second feoffment were made without valuable consideration, such second feoffment would have been *tortious* as to the interests under the first, at the same time that it would have enured to the extinction of the future power of revocation in the feoffor; and if after such second feoffment the feoffor were to convey for valuable consideration, the 5th section of the statute under discussion would enable the valuable purchaser to supplant all the former interests, except the lease for years, leaving the second feoffment good as an extinction of the power of revocation, but avoiding its effect as far as it might have enured to the corrobo-

(3) Vid. Co. Litt. 48. b. et vid. note 318. by Harg. and Butl. Hal. MSS.
(4) 1 Rep. 112. a. and b.
(5) Vid. Plowd. Com. 352. 4 Leon. 221. 2 Roll. Rep. 323.

ration of the first. And if the lease be supposed out of the case, the subsequent conveyance to the purchaser would carry the whole estate in the land, discharged of the power of revocation. Thus it was said to be resolved in *Twyne's* case, that if a man have a power of revocation, and afterwards, to the
626 intent to defraud a purchaser, levy a fine, or make ||a feoffment or other conveyance to a stranger by which he extinguishes his power, and afterwards bargain and sell the land to another for valuable consideration, the bargainee shall enjoy the land, for as to him the fine, feoffment, or other conveyance by which the condition was extinct was void by the said act; and so the first clause, by which all covinous and fraudulent conveyances are made void as to purchasers, extends to the last clause of the same act, when he who makes the bargain and sale had a power of revocation; and it was said in the same case, that the statute has put voluntary estates, with power of revocation, as to purchasers, on the same footing with estates made by fraud and covin to deceive purchasers.

It must be owned that in the case of *Cross* v. *Faustenditch* (6); it seems to have been intimated as the opinion of the court, that the 5th section of the statute in question executed the power of revocation in favor of the purchaser; but it is to be observed that the clause of the statute was there recited thus, viz. "that if one makes a conveyance with clause of
627 revocation, ||and afterwards for consideration of money, or *for other considerations*, bargains and sells, demises or grants the land to a stranger, the said conveyance shall be void and *revoked*." If the clause aforesaid was thus found by the jury, they found what nobody else can find in the statute. But it is enough for our present purpose to remark, that instead of the words "shall be void and revoked," the statute uses the words following: shall be adjudged to be *void, frustrate, and of none effect*." The case afterwards states the question to be, "whether this voluntary and revocable conveyance shall be said to be void and *revoked quoad* the lessee." But one cannot help observing, that though it is of little consequence to the interest of the purchaser, so as he gets the better of the first conveyance,

(6) Cro. Jac. 180.

in what manner the destruction is wrought, yet it imports much to general analogy and consistency of principle, that the different legal modes by which an identity of effect is produced, should be carefully distinguished; and it is one thing to say, that the statute destroys the conveyance by *virtue* of a power of revocation contained in it, and ‖another, that it renders it 628 *ipso facto* void against a subsequent purchaser by *reason* of such power's being *mentioned* and *contained* in it.

We observe too, that the conveyance in the above case of *Cross* v. *Faustenditch* was voluntary throughout, so that it was fundamentally void against a purchaser upon the general construction of the statute. And that though the voluntary grantor, when he afterwards made the lease, which was the valuable interest protected by the statute, had an estate for life, out of which the lease *might* have been derived; yet the statute, which *makes no use of any part of the fraudulent conveyance*, was construed to forbid such a construction, by *radically* subverting the former voluntary conveyance *quoad* the interest to be protected, and by reinstating the voluntary grantor in his old fee simple *as to the lessee*, who derived in paramountcy over all the estates created by such conveyance.

SECTION II.

We are to observe, that the clause of the statute in question, whereby a conveyance, with power of revocation at the pleasure of the grantor, is made void as against a subsequent purchaser is followed by a proviso, by which it is declared, that "no lawful *mortgage* made or to be made *bona fide*, and without fraud or covin, upon good consideration, shall be impeached or impaired by force of the said act, but shall stand in the like force and effect as the same should have done, if the said act had never been had or made." By virtue of which proviso, some powers of revocation, though reserved to be executed at the *pleasure* of the grantor, may yet be valid and sustainable against subsequent

purchasers for valuable consideration. And the cases are clearly distinguishable in reason, for if the dominion reserved be
630 made to depend upon a condition ‖precedent, for the performance of which the whole conveyance is evidently designed as a coercive security, the transaction has a notorious meaning and character which repels any charge of fraud or inconsistency. Thus, in the case of *Griffin* v. *Stanhope* (1,) where the husband, in pursuance of a promise before marriage, made a lease to some friends of his wife to her use, for a term of years, if she should so long live, to commence after his death, with an indorsement expressing the intent thereof to be, that when there should be a jointure of £100 *per annum* settled upon her according to the agreement, then the lease should be void, though this lease was to determine *at the will* of the baron, yet the court held that it could not be shaken by a subsequent purchaser; and they adverted to the distinction between a lease made with a proviso, that if the lessor pay *ten shillings*, the lease should be void, which was clearly only a nominal condition, (the intent of such a deed being substantially to reserve a dominion over the estate, notwithstanding the conveyance,)
631 and a lease by way of *mortgage* with a proviso, ‖that if £1,000 be paid on such a day, that then the term shall cease.

It has been holden, too, that a power to charge a *particular* sum reserved by the grantor of an estate, shall not be construed fraudulent within this statute. Thus in the case of *Jenkins* v. *Keymishe* (2,) where the father and settler upon his son's marriage reserved a power to himself, by deed in writing, to charge the settled lands with the payment of £2,000, Lord Hale and the rest of the court held that "this proviso for charging with £2,000 was not a power within the words of the statute (it being a particular sum) to revoke, determine, or alter the estate." But though a conveyance do not, in terms, contain a power of revoking, determining, or altering the estate conveyed, in the words of the statute, yet, it may virtually come within the clause under discussion, if it contain a power of so indefinite an import and extent as to be tantamount in its operation to an *express*

(1) Cro. Jac. 455. (2) 1 Lev. 150.

power of revocation. Such was the power reserved by the settler in the case of *Lavender* v. *Blackstone* (3,) which was to make leases ‖of all or any part of the lands for any 632 number of years, with or without any rent: this was in effect, a power of defeating, at his pleasure, the whole settlement which had been made of those lands. And in a subsequent case (4,) where W. M. made a conveyance to B. and others, of his estate to the use of himself for life, with power to mortgage such part of the estate as he should think fit, and for *what sums* he should think fit *(a,)* the court held that such power amounted in effect to a power of revocation, and was, therefore, fraudulent as against creditors by statute and judgment.

SECTION III.

‖ It is deserving of observation, that in the above-men- 633 tioned case of *Lavender* v. *Blackstone*, the power was restrained to be executed only with the consent of the trustees; a circumstance appearing at first view to take the power out of the reason of the statute 27 Eliz. as not being dependent upon the will or pleasure of the grantor. But it appears from the case, that the trustees were persons of the grantor's own voluntary nomination; and, therefore, we may conclude, were interposed not with any view to a real restraint upon the grantor, but merely to color the transaction. The distinction as to this question upon the statute, between the cases where the necessity for such consent operates as a real check to the power, and where it is interposed by way of screening a real power of voluntary revocation seems to be adverted ‖ to in that passage in *Twyne's* case, 634 (1) wherein Lord Coke observes, that "if A. reserve to himself a power of revocation, with the assent of B., and afterwards bargain and sell the lands to another, the bargain and sale is good, and within the remedy of the act, for otherwise the good provis-

(*a*) This, though not stated in the case, seems clearly in the judgment.

(3) 2 Lev. 146. (4) Vern. 510. Tarback v. Marbury. (1) 3 Rep. 826.

ion of the act by a small addition and evil intention would be defeated." The consent of a near relation was probably there understood, *(a)* which was one of the points in the case of *Lavender* v. *Blackstone*, *(b)* as we find it reported in *Keble* (2.)— Thus also Bramston C. J. is said (3) to have maintained upon this clause of the stat. 27 Eliz. the distinction between a mere shift by introducing other names as consenting parties to the execution of such power, and the necessity for the assent of third persons veritably interposed to prevent the execution of
635 ‖the power without valuable consideration. Where this sort of consent has been made necessary, the power, though co-extensive with the settlement, has been adjudged to be out of the words and meaning of the statute 27 Eliz. c. 5. sect. 5. This appears from the case of *Buller* v. *Waterhouse* (4) which was to this effect. Sir J. M. and his wife, in right of the wife, were seised in fee of the rectory of Bradford, and in consideration of the marriage of John their son, and of £5,000 portion paid with the intended wife, covenanted with Sir J. L. and three others, relations of the intended wife, to levy a fine (which was accordingly levied) of the said rectory (amongst other things) to the use of Sir J. M. for life, remainder to his wife for life, remainder to John their son and his heirs, provided that it should be lawful for Sir John or his wife to revoke the uses, with the consent of the said four persons, or the survivors or survivor of them, or of the executors or administrators of the survivor, testified under their hands and seals. Sir J. M. died, and his wife entered and
636 sold the said rectory for £400 ‖ paid, and £1,000 secured by a mortgage of the said rectory; which sale and conveyance were made without the consent of the survivor of the trustees, who had been named on the part of the son and his wife, and for the preservation of their estate. It was found by the jury, in their special verdict, that the whole consideration extend

(a) In Buller v. Waterhouse, Lord Coke seems to have been understood by the court to have had this meaning. But in Lane 22. the Barons appear to have understood him otherwise.

(b) As the case of Standen v. Bullock is reported in Keble, it does not appear that there was more than a single trustee, who was the father-in-law of the person to whom the power was reserved.

(2) 3 Keb. 526. (3) Vid. 3 Keb. 752. (4) Sir Thomas Jones 94.

as well to the rectory, as to all the other lands. And it was argued by Pollexfen, and agreed by the court, that the words in the said clause of the act, *at their will and pleasure*, were to be interpreted, *at their choice, liberty, and election*, i. e. *without the restraint of any person*; but that in the case before them the will and pleasure of the *party* was made to depend upon the will and pleasure of *others*.

And as to the case of *Standen* v. *Bullock* it was said, that there the consent restraining the power seemed to be lodged in a person who was at the devotion of the maker, (c) and appointed by him; but that, in the principal || case, the consent was 637 placed in persons intrusted for the wife; so that the conveyance was not subject to the will and pleasure of the makers, according to the expression of the statute.

A modern writer has observed, (5) that "he had not met with any case which went so far as to say, that a mere voluntary conveyance, with power of revocation reserved, but restrained to be executed with the consent of third persons, was not within the equity of the statute 27 Eliz.: that in the case of *Buller* v. *Waterhouse* that point was considered, but did not seem to have been settled, because all the claimants under the conveyance were purchasers for valuable consideration." It should seem, however, very inconsonant to the true reading of this statute, to suppose that these powers of revocation can in any shape have a conservatory effect upon its operation. They may work to the destruction of a conveyance unless they fall within some of those exceptions above considered, || but we can never rightly infer that those 638 saving circumstances which repel from these powers the imputation of fraud can convert them into positive proof of honesty of intention, or that because they are not the *disorder* they must necessarily be the *cure*. The truth seems to be, that whether a power of revocation be evidence or not of the fraudulent intent within the statute, must depend upon its own characteristic circumstances; but that, if a conveyance *merely* voluntary, or accompanied with other badges of fraud, contain a power of revo-

(c) Nothing of this appears in the case as it is reported in Moore, under the name of Bullock v. Thorne, vid. Moore 615.

(5) Mr. Powell's Essay on Powers, 329.

cation conceived in such terms as have been holden to take it substantively out of the meaning of the particular clause of the statute relating to fraudulent powers of revocation, yet, upon the general construction of the statute, the other indications of fraudulent intent will have their accustomed effect in avoiding the alienation or gift against a subsequent purchaser for valuable consideration. On the other hand it clearly appears by *Buller* v. *Waterhouse* above cited, (and it seems to have been the true
639 ‖ point in question in that case,) that even the valuable consideration of marriage will not sustain a conveyance against a subsequent valuable purchaser, if it contain such a voluntary power of revocation as falls clearly within the meaning of the above-mentioned clause of the statute. For, had the valuable consideration of matrimony been sufficient to heal the effect of such fraudulent power, there would have been no necessity for going into the question as to the character of the power contained in the settlement under discussion in the case above mentioned. And there could have been no foundation for the doubt stated in the opinion of Mr. Booth, published at the end of the last edition of the Touchstone, whether the reserving of a power to the grantor or original owner of the land, though checked by requiring the consent of the trustees, does not make a settlement upon marriage (*d*) fraudulent within the statute 27 Eliz. c. 4. But in the case of *St. Saviour's* in Southwark reported in Lane
640 ‖(6,) in which case it appears that the statute came very generally under consideration, it was holded by the Barons, of whom Tanfield was the chief, that though the consideration of marriage be a good consideration, yet if a power of revocation be annexed to it, it is void as to strangers.

(6) Lane 22.

(*d*) For such seems clearly to have been the sort of settlement adverted to by Mr. Booth.

CHAPTER VII.

SECTION I.

|| But the word Strangers with which the foregoing Chap- 641
ter was closed, must be confined to such *only* as come in upon valuable consideration; for as to other persons, though the grantor may have enabled himself to make a fresh grant to a volunteer, by an express reservation of a power to that effect, yet it is plain that such subsequent conveyance can only operate by virtue of the special dominion retained by the grantor, and not by any constructive avoidance under the statute of 27 Eliz. For voluntary conveyances were always binding upon the party, and all claiming voluntarily under him; and the statutes of Elizabeth against fraudulent conveyances have expressly guarded against a construction in derogation of this rule.* Thus in the 13th Eliz.

*Fraudulent conveyances and gifts are void only against purchasers and creditors but shall bind parties themselves and their representatives.

Cro. Jac. 370. 2 And. 172; [Franklin v. Thombury, 1 Vern. 132; Villers v. Beaumont, Do 100; Bole v. Newton, Do. 464; Clavering v. Clavering 2 Vern. 473; Boughton v. Boughton, 1 Atk. 325. And if there be two or more voluntary conveyances the first shall prevail, unless the latter be for the payment of debts, 1 Ch. R. 99.] An administrator cannot avoid the deed of his intestate by showing the same to have been made to defraud the creditors of the intestate, though there be no other fund from which the debts can be paid. Administrator of Martin v. Martin, 1 Vt. 91. Osborne v. Morse, 7 J. R. 161. King v. Lyman, 1 Root 104. Malin v. Gournsey, 16. J. R. 189. Rodgers v. Hillhouse, 3 Conn. 398.

Where A. made a fraudulent sale of goods to B. and delivered the possession of some of them in his life time, and the rest came to the possession of his administrator it was holden that in an action brought by B. for these goods, that the administrator could not plead the statute of 13 Eliz. c. 5. nor maintain the possession of the goods even to satisfy creditors. Hawes v. Leader, Yelv. 196; Cro. Jac. 270, S. C.

But if a man make a deed of gift of his goods in his lifetime, by covin to defraud his creditors of their debts; yet after his death the vendee shall be charged for them, 13 H. 4. 46; Ro. Abr. 549; Yelv. 197; Cro. Ja. 271. 2 T. R. 587. Usher v. Hazelton, 5 Greenlf. 471. Blow v. Maynard, 2 Leigh, 30.

it is provided, that the fraudulent gifts and grants there denounced shall be void *only* against that || person or those persons, his or their heirs, successors, executors, administrators, and assigns, whose actions suits, debts, accounts, &c. And in the 27 Eliz. it was with similar caution provided that the fraudulent conveyances in the contemplation of that act should be void *only* as against those who should thereafter purchase upon *good*, i. e. valuable consideration. Thus was the statute 13 Eliz. understood in the case of *Hawes* v. *Leader*, (1) which was shortly as follows: A. dying intestate, after having granted to B. for a consideration of £20 all his goods mentioned in a schedule, by a deed, containing a covenant that the grantor, his administrator, &c. should quietly deliver them to B. and having bound himself in £40 to the performance of that covenant, B. demanded the goods of the administrator, who refused to deliver them; whereupon B. brought his action against the administrator, and in his declaration shewed in specie the goods contained in the schedule. The defendant pleaded the statute 13 Eliz. c. 5. and that the intestate was in-
643 debted to divers persons in several sums (naming the persons and || specifying the sums) to the amount of £100 and being so indebted, on, &c. made the deed in question, being a grant of the goods, to the value of £80 and no more; and further, that the said deed was made by *fraud* and *covin* between the intestate and the plaintiff, to deceive his creditors; and that the intestate, notwithstanding the deed of gift, used and occupied all the goods during his life. The plaintiff replies, that the defendant had assets in his hands to satisfy the debts demanded, and that the deed of gift was made upon good consideration; whereupon issue was joined, and at Huntington assizes Cook, C. J. refused to try the cause, because the issue was not well joined, and a repleader was ordered; upon which the defendaat pleaded as before, and the plaintiff demurred. Judgment was given for the plaintiff, because, among other reasons shewn for the demurrer, it was insisted that the defendant was not a person enabled by the statute 13 Eliz. c. 5. to plead as he had done; for that the statute had made the deed void as against the *creditors*;

(1) Cro. Jac. 270.

but not as against the *party* himself, his *executors*, or *administrators*, || and against *them* it remained a good deed. *(a)*

This rule of construction does not confine itself to these statutes of Elizabeth, but is applicable to most of the instances wherein conveyances have been made fraudulent by statute; thus, fraudulent conveyances by tenants in dower, or alienations by jointresses upon the statute 11 Hen. 7. have always been held good against the party making them, though invalid as against the interest attempted to be injured, (2) which attribute of a conveyance, to be void as against one person, and valid as to another, was said by Lord Hobart to be one of the commonest cases of the law. (3) But in *Packham's* case (4) this doctrine of partial relief upon the statute 13 Eliz. c. 5. was carried a step further, for a case was there put, wherein the party injured, though he did not claim *under* the party making || the fraudulent con- 645
veyance, was considered as not coming within the *protection* of the statute. The case was thus: A man died intestate, and the ordinary committed administration to a stranger; after which the next of kin of the intestate took out a citation in the spiritual court to have the administration, which had been granted, repealed; pending which suit, the administrator, to defeat the plaintiff in the spiritual court of the effect of his suit, sold the goods of the intestate to the defendant; and the letters of administration being revoked, and administration being afterwards committed to the plaintiff, he brought an action of trover against the defendant for the goods of the intestate, which had been conveyed to him by the first administrator. And it was resolved that the action did not lie; for as the first administrator had, without question, the *property* of the goods in him, he might give them to whom he pleased; and, though the letters of administration were afterwards revoked, yet the gift which had been made was not thereby defeated. And it was || the opinion of the court 646
that even if the gift had been made by *covin* though it would

(a) And such voluntary deeds have been held availing to the purpose of working a forfeiture or breach of a bond statute or covenant, though void within the statutes of fraudulent conveyances. Vid. the case of Gewen v. Roll. Cro. Jac. 131, 132. and Beverley v. Gatacre, 2 Roll. Rep. 305.

(2) Hob. 166. (3) Id. ib. (4) 6 Rep. 18.

be void by the statute 13 Eliz. c. 5. against a *creditor*, yet it would have remained good against the *second administrator*.

The statute 27 Eliz. c. 4. has the same partial operation. The party, and those claiming under him, are as much bound by a voluntary conveyance, as where the most valuable consideration has been given. For that statute has only altered the law in favour of *purchasers* for *value*, and before the statute, the heir could never set up his title against the voluntary alienee of his ancestor, nor even call upon him for a contribution, where both were amenable to the creditors of the ancestor, as tertenants. Insomuch, that if a man seised of three acres had acknowledged a recognizance or statute, and afterwards enfeoffed A. of one acre, and B. of another, *without any valuable consideration*, and died, and the third acre had descended to the heir; in this case, if execution were taken out *only* against the *heir*, he could not have
647 contribution, for he was considered, say the book, as coming to the land, without any consideration, and sitting in the seat of his ancestor. (5)

Courts of Equity have the same respect for executed voluntary conveyances, where no valuable claims are set up in opposition to them, and will not assist the party making them, or his representatives claiming as such in setting them aside. Thus in the case of *Hobson* v. *Staneer* (6) in Chancery, where the plaintiff, after having settled his estate upon his first marriage, with limitations to the brothers of his intended wife in fee preceded only by a provision for the wife, without any notice taken of issue, had, upon the death of his first wife without issue, contracted a second marriage, and resettled his estate upon such second marriage in consideration of a portion paid, and afterwards *himself* brought a bill to set aside the first and establish the second settlement, the court refused the relief prayed, as no fraud or circumvention was proved in the case, or any mental incapacity in the set-
648 tler to raise || a suspicion of improper control; and it was said by the court, that the plaintiff was not the *party to complain*, and though an executed conveyance to a purchaser for val-

(5) 3 Rep. 12. b. Sir William Herbert's case; and see Moore 169. S. C. and Gawdy's case there cited.

(6) 9 Mod. 80.

uable consideration vacates, as has been sufficiently shewn, an anterior voluntary conveyance, yet if a man, after making a voluntary disposition of his property, manifests by some collateral act his intention to defeat his first conveyance, it seems, that in some cases, there may be ground for an application to Chancery for its preventive interference. As in the case of *Brookbank v. Brookbank*, which is thus stated in the book called Equity Cases Abridged. (7) A. on the marriage of his son settled several lands in the following manner, viz. as to part to the use of himself for life, afterwards to the use of the son for life, then to the use of the first and other sons of that son in tail, and for want of such issue, to the use of the plaintiff, who was his brother, and his heirs; and as to other part of the lands, to the use of the son for life, and after to the use of the wife for her jointure, then || to the 649 first and other sons in tail, and for want of such issue to the plaintiff and his heirs. The son and wife died without issue in the lifetime of A. and after their deaths A. got the settlement, and cut it in pieces; but the counterpart was entire, and in the hands of A.; and the bill was brought to discover it and have it preserved. The counterpart being confessed in the answer, the plaintiff obtained an order at the Rolls to have it brought into court, and a motion was made to have that order discharged, for that the remainder to the plaintiff was merely voluntary, and therefore he ought not to have any aid from a court of Equity. The court would not discharge the order, but directed the deed to be brought into court, there to remain, in order thereby to prevent A. from selling the estate from the plaintiff.

Neither can a man defeat his own voluntary conveyance by his subsequent will, even though his will contain an express provision for the payment of his debts. This was determined in the case of *Villers* v. *Beaumont*, (8) || which was thus: 650 Lady A. B. took a lease from a hospital for three lives in trust for her and her heirs. She died, and the lease came to W. B. who, a little before his death, on a scrap of paper, at an ale-house, but under hand and seal, settled this term (in which he had then only a trust) upon the plaintiffs his cousins, to the intent to pay

(7) Eq. Ca. Abr. 168. (8) 1 Vern. 100.

his debts, and gave the surplus to them; but, afterwards, being dissatisfied with this settlement, which he had delivered out of his hands to a creditor, made his will in writing, and thereby devised the term, subject to the payment of his debts, to his half brother, Lord B. in whose family the lease had been for some time; and the question was whether the deed or will should prevail; but the Lord Chancellor Nottingham said, there was no color in the case. If a man will improvidently bind himself up by a voluntary deed without reserving a power of revocation, this court will not loose the fetters which he has put upon himself, but he must lie down under his own folly; for if, said his Lordship, you would relieve in such a case, you must consequently estab-
651 lish || this proposition, viz. that a man can make no voluntary disposition of his estate, but by his will only, which would be absurd.

In *Franklin* v. *Thornbury*, (9) where a voluntary deed was cancelled, and the lands afterwards devised for the payment of debts, and debts paid, it was doubted whether equity would not relieve even in such a case, since the testator himself could not avoid his voluntary deed. And again in *Bale* v. *Newton* (10) this doctrine was strongly confirmed. There, an estate was conveyed to the use of the grantor for life, remainder, as to a third part, to his wife for her jointure; remainder of the whole to his infant heir in tail; and, two days afterwards, the settler made his will and devised the same estate, among other things, to his infant heir in tail, but *subject to the payment of his debts*, in case his personal estate should not be sufficient to pay both debts and legacies. The object of the bill was to have the debts paid out of the land, that so the legacy might be paid out of the personal es-
652 tate; but by the Lord Chancellor, the settlement || though voluntary, was not revocable, and, therefore, having settled the lands, the testator had thereby disabled himself to charge the premises by his will; and where A. on a quarrel with his eldest son, made a settlement of £100 *per annum* on his wife in augmentation of her jointure, and afterwards, being reconciled to his son, cancelled the deed, which was found so cancelled at his death, and the deed, on a trial at law, being proved, had been found

(9) 1 Vern. 132. (10) 1 Vern. 464.

good, though cancelled, a bill filed in the court of Chancery for relief was dismissed by Lord Keeper Somers. (11)

And though it is not to be disputed but that a person making a voluntary conveyance may enable himself to defeat it by his own act, by reserving a power of revocation; yet where (12) a man made a voluntary settlement, with power of revocation on the tender of a guinea, and afterwards settled the same lands to different uses, but without tendering the guinea, it was said by the Chancellor that the court might supply an informal or defective revocation, but could not ‖make a revocation 653 where there was none. And it was said by the court, that it must be proved either that a guinea was tendered, or that the grantor declared she intended to revoke the former settlement; for though it had not all the formalities and circumstances mentioned in a power of revocation, yet if it appeared to be a sober solid act, and done *animo revocandi*, it should be carried into effect, but that *that* was not made out *(b)*. It was then insisted, that the subsequent ‖deed should be taken as a 654 sufficient revocation, being of the same land, and made to different uses and purposes; but this the court would not allow.

All these cases were further confirmed by Lord Hardwicke in

(11) Cited in Prec. in Chan. 235. as Lady Hudson's case.

(12) Arundel v. Philpot, 2 Vern. 69.

(b) The reader may see this case cited and approved by Lord C. J. Holt, in his great argument in Bath and Montague's case, 3 Chan. Ca. 108. His Lordship observed, that the case came first into the King's Bench, thence into Chancery, and afterwards into the King's Bench again, where it had its period. It was proved upon the second trial at law, that in the heat of provocation the guinea had been actually tendered, and consequently that the revocation was good. We are to observe, however, that, in Bath and Montague's case, the persons, in whose favor the voluntary settlements were made, were on a foot of equality in respect to consideration; but if the second conveyance had been a settlement upon children, it seems that there would have been ground for inferring in equity the *animus revocandi*; and for this see the same great argument in Bath and Montague's case. If, however, the second conveyance had been only to a collateral relation, as a nephew upon the consideration of natural love and affection, it appears by the Lady Burgh's case, Moore, 833. that no relief could be had in equity or at law against the first conveyance containing such unexecuted power of revocation.

the case of *Boughton* v. *Boughton* (13,) where a voluntary deed, without power of revocation, though kept and concealed in the grantor's possession till his death, being without power of revocation, was not suffered to be supplanted by a subsequent will. And this and all the other cases to the same effect were carefully distinguished from the principle of the determination in *Naldred* v. *Gilham* (14,) where a voluntary deed, being executed in favor of a nephew, without power of revocation, and being kept in the hands of the grantor, who was an old woman,
655 somebody, on ‖behalf of the object of the settlement, had surreptitiously obtained an attested copy of it, after which the grantor had burned the original, and settled the estate upon another nephew; the first nephew's bill to establish the copy of the first settlement was dismissed with costs; upon which the second nephew, claiming under *his* settlement, brought his bill to have the attested copy given up, and had a decree in his favor because the attested copy had been *indirectly gained.*

In the case last produced the *delinquency* of the party who was the object of the voluntary settlement vitiated and damned his title to assistance in equity; but there have been cases wherein the ostensible limitations and provisions of a voluntary deed, made without power of revocation, being clearly intended only to disguise a secret trust for the grantor, however void they might be as against a purchaser, have been made to give way to a subsequent disposition by the will of the grantor; such is
656 the tendency and principle of the ‖cases of *Ward* v. *Lant*, (15,) and *Birch* v. *Blagrave* (16,) where, in the first case the bond, in the last case the deed of settlement were subjected to the dispositions of a subsequent will.

It was evident in the case of *Ward* v. *Lant*, just above-mentioned, that the grantor did not mean to part with the beneficial interest, for the conveyance was made secretly to a daughter, who had been already portioned, by way of putting the *legal* estate out of himself, to enable himself (as he mistakenly conceived) to swear to his disqualification to serve as sheriff of London, though, being aware of his mistake in time, he did not take the oath, but

(13) 1 Atk. 625. (14) 1 P. Wms. 577.

(15) Prec. in Chan. 182. (16) Ambl. 264.

paid the fine; and so nothing was done in fraud of the law: there was therefore a trust resulting to the grantor, which passed by his subsequent will; so that in this particular class of cases, it seems that a court of equity will give effect to a will, by means of a constructive trust, where it is without effect at law. And in ***Ward*** v. ***Lant***, above cited, where the voluntary bond was given to screen the || obligor from taxes, the principle of the 657 decision rested on the ground that equity would have relieved against the obligee, if she had gotten the bond into her hands out of the possession of the obligor who had never parted with it, and had put it in suit against him. The special purpose of making the bond, rendered it a trust for the obligor himself, and the court decreed it to be set aside as against the subsequent will. It seems an undisputed proposition, that whatever equitable interest a voluntary conveyance or bond leaves in the grantor or obligor, may pass by a subsequent voluntary disposition: as in the case of ***Rand*** v. ***Cartwright***, (17) where A. made a voluntary conveyance to B. and afterwards a mortgage of the same land, and the first deed, on a trial at law, was found fraudulent, and B. exhibited his bill to redeem the mortgage; it was decreed that though the deed to B. was fraudulent, as being voluntary, as to the interest of the mortgagee, yet that it was good to pass the equity of redemption; for a voluntary deed is good, both in equity and at law, against the party making it and his representatives. So if a deed || be ***unduly*** obtained, so as that a bill 658 might be brought in equity for relief against it by the party making it, the beneficial interest or equitable title will pass (18) by his subsequent will: for, though it seems capable of being objected that the testator had nothing but a right to a remedy, which was not assignable, yet such right is held to be in the nature rather of an equity of redemption than a bare right to an action, and is therefore assignable; and as the testator might have come into equity to be relieved against such deed, so may his devisees.

Where two persons claim under voluntary settlements or conveyances, the person deriving under the first had the estate at law, and shall hold it against the second grantee both at law and

(17) 1 Chan. Ca. 59. 219. (18) Blake v. Johnson, Prec. in Chan. 142.

in equity. (19) Thus in the case of *Clavering* v. *Clavering*, (20) where C. made a voluntary settlement of an estate, subject to some annuities, in trust for his grandson and his heirs, and seven years afterwards made another voluntary settlement of the same estate to the use of his eldest son for life, remainder to
659 his first and other sons in tail, with ‖ remainders over; and afterwards by will gave a considerable estate to his grandson; although it was proved that C. always kept the first settlement in his custody, and never published it, and that it was found after his death among his waste papers; and that the latter deed was often mentioned by him; and that he had told the tenants, that the eldest son was to be their landlord after his death, yet the son could not be relieved against the first settlement. And again in the case of *Goodwin* v. *Goodwin*, (21) where the plaintiff and defendant claimed by two several voluntary deeds, the court, after ordering precedents to be produced of cases wherein a prior voluntary conveyance had been set aside against a subsequent conveyance which was voluntary also, dismissed the plaintiff's bill which prayed to have the second voluntary conveyance established against the first. (*c*)

660 ‖ With respect to agreements and defective conveyances, it seems pretty well settled that courts of equity will not lend their assistance to carry them into execution, unless there was a meritorious consideration *at least* for making them: which rule is laid down in the case of *Coleman* v. *Sarrel*, (22) by Lord Chancellor Thurlow in its greatest extension, without any qualification in favor of agreements under seal; in which case his Lordship observed, "that wherever a deed is not sufficient to pass the estate out of the hands of the conveyor, so that the party must

[19] Vid. 3 Chan. Ca. 123.

[20] 2 Vern. 373. and see the case in Prec. in Chan. 235. stated rather differently as to circumstances, but the same in principle.

[21] 1 Chan. Rep. 92.

(*c*) But a difference seems to have been made in equity where the second conveyance was for payment of debts. Vid. Vin. Abr. tit. Voluntary Conveyances, E. 1. G. 1. Toth. Trans. Dom. Darcie v. Allerton.

[22] 2 Bro. C. R. 12.

come into equity, the court has never yet executed a voluntary agreement. To do so would be to make him who does not sufficiently convey, and his executors after his death, trustees for the person to whom he has so defectively conveyed, and a court of equity has never done that." And the cases seem in general to agree in establishing the position, that where, upon a deed, only nominal damages, by reason of its want of consideration, can be recovered at law, a court of equity will not afford to the party a more substantial relief. || (23) But though the mere cir- 661 cumstance of the agreement's being under seal seems not of itself sufficient, without an equitable consideration, to influence a court of equity to compel a specific performance, yet where a man, by his voluntary *bond*, has made himself a debtor at law to a *certain (d)* amount, it appears that, although a real debt by simple contract will obtain a preference in payment, yet it is good in equity, if no creditor be thereby deprived of his debt, against an executor or administrator. To this effect decidedly was the opinion delivered in the case of *Lechmere* v. the *Earl of Carlisle*, (24) by Sir Joseph Jekyl, the Master of the Rolls; and in the case of *Williamson* v. *Codrington*, Lord Hardwicke seemed to entertain correspondent sentiments. (25) In those cases which were cited by the counsel in *Sarrell* v. *Coleman*, in support of the cross bill, (26) either the voluntary conveyance had supported itself upon a meritorious and equitable consideration, or the relief against it had been sought || by a volunteer who stood 662 only on a foot of equality; but in *Sarrell* v. *Coleman*, the cross bill prayed the specific performance of a deed *merely* voluntary, and was dismissed on that account. Where, indeed, an absolute conveyance has been made of a subsisting *equitable* estate, the court will perfect it though it be voluntary, for an equitable estate is transferible, *qualecunque est*, without consideration, as well as alegal estate, and every *cestui que* trust, whether volunteer or not, is entitled to the aid of a court of equity, in order

[23] Vid. 1 Atk. 10. et vid. Fursaker v. Robinson, Prec. in Chan. 475.

(d) And it seems that in courts of equity debts on bonds for the payment of sums certain, are preferred in payment to demands on articles sounding in damages; vid. 2 Vern. 272. Whitchurch v. Baynton.

(24) 3 P. Wms. 222. [25] 1 Ves. 514. [26] 3 Bro. C. R. 14.

to avail himself of the benefit of the trust, and his want of consideration does not impeach his right to call for the legal estate. (27) It was on this principle, probably, that in *Tudor* v. *Smayne*, cited above, (28) where the husband had disposed of the wife's trust term, and a bill was filed by the assignee against the trustees of the term and the wife to compel them to assign over the legal estate, the court decreed according to the prayer of the bill, and was not diverted by the arguments of the counsel for the defendants, who contended that, since if the husband had been
663 plaintiff, the court would || not compel the trustees to assign to him, without his making some settlement for his wife, the plaintiff who derived under the husband ought not to be in any better condition.

In the case of *Williamson* v. *Codrington*, before the settler was evicted, he had settled the estate by a formal conveyance to trustees, and such as would, it seems, have given the objects of that settlement, though volunteers, a right to the aid of equity to enable them to obtain the full benefits of the trusts in their favor, if nothing had happened to alter the estate; and though the settler was subsequently evicted and dispossessed by ejectment, and afterwards received one thousand guineas by way of composition for his claim, yet it appeared to the Chancellor as a plain case, that he did not mean to defeat the children of the provision originally designed for them, and it seemed to be on this ground principally that his Lordship decreed them a compensation in part out of the assets.

664 ||What shall be regarded as a *meritorious* consideration to induce the court to compel the specific performance of agreements, it is not easy to reduce to any rule of universality; but it appears by the cases, that where agreements reasonable in themselves are entered into to save the honor or peace of a family, or for settling disputed boundaries, and thereby purchasing mutual repose (29) courts of Equity have lent their aid in carrying them into effect. But where the meritorious considera-

[27] Vid. the case of Lechmere v. Earl of Carlisle, 3 P. Wms. 222. per Sir J. Jekyl; and 4 Ves. Jun. 354.

[28] Vid. 2 Vern. 370. et supra 300.

(29) 1 Atk. 5. Stapilton v. Stapilton, 1 Ves. 450. Penn v. Lord Baltimore.

tion is founded wholly on consanguinity and natural affection, it seems to be considered as settled that the court will not grant its *specific* relief to persons not coming within the legal description of wives and children, so that a grandson or an illegitimate child has been holden not to come within the benefit of this privilege (30). It is true that the specific performance of *marriage articles* has been decreed in favor of collaterals (31), but there the relief appears to be governed by certain special rules which were noticed by Lord Hardwicke in the case of *Goring* v. *Nash* (32), and have shortly been considered in a former part of this essay (33).

‖ There are cases also of equitable predilection where the 665 court will *judge* between *mere* volunteers, and will be moved to a decisive interference without the attraction of a valuable or meritorious consideration; as where it entertains an application by an heir to have his title disencumbered by applying the personal estate in exoneration of the real: in which cases the court has often given its assistance to effectuate the objects of mere voluntary claimants (34). The court also lends itself to the heir or devisee who founds his claim upon an agreement of the ancestor or devisor to lay out money in the purchase of land, where the fund remains specifically unaltered; for the rule of equity is, that money, covenanted to be laid out in land, is to be considered as land, and land articled to be sold is to be treated as money; which rule rests upon a rule more ancient and fundamental, viz. that what is agreed to be done for valuable consideration is to be regarded as actually performed from the *moment the agreement is entered into.* But the assistance afforded to an heir or devisee in such cases, does not, perhaps, form an exception to the ‖rule laid down in the 666 case of *Coleman* v. *Sarrell*, above cited; for it is a principle of consistency, rather than of predilection or choice between two claimants, by which the court is governed in its determination of such contests between the real and personal representatives. The maxim being once established that money

[30] 2 Ves. 582. Tudor v. Anson.
[31] Vid. Vernon v. Vernon, 2 P. Wms. 594.
[32] 3 Atk. 189. [33] Vid. supra, 129, et seq.
[34] 3 P. Wms. 322.

covenanted to be laid out in the purchase of land, is impressed with the character and qualities of real estate, and *that* not *partially*, *modally*, or *suspensorily*, so as to let in a diversity of construction with respect to future claimants, but by an ideal transmutation of the nature of the thing itself taking place at the instant of the execution of the articles, it seems that all the legal analogies flowing from such a notion, must necessarily attach
667 upon the subject though || specifically unaltered. *(e)* And thus the heir or devisee who comes into a court of Equity to have the benefit of such articles or agreement against the personal representative, does not rely upon any equitable predilection, but upon the consequence of a rule which could not be set up in the first instance without necessarily involving the admission of a new order of claimants.

And it seems to flow from the above doctrine, that if the property instead of remaining in the hands of the covenantor, be
668 placed under the direction || of trustees, the operation of the rule continues the same for no trustee can allege the want of consideration in his *cestui que* trust.

But the assignment of expectant interests resting on contingencies or possibilities, falls within the above rule laid down in *Coleman* v. *Sarrell*, for they operate as *agreements* in the understanding of a court of Equity, and, therefore, according to the said rule, the court will not assist them or give them effect, any

(e) This doctrine has been maintained by numerous and great opinions in all its plenitude of analogies and consequences; but it was holden by Lord Somers, in the case of Chichester v. Bickerstaff, 2 Vern. 295. that "though in many cases money shall be considered as land, where bound by articles in order to a purchase, yet, while it remains money, and no purchase made, it shall be deemed part of the personal estate of such person who might have *aliened* the land in case a purchase had been made;" which opinion was adopted by Thurlow in Pultney v. Earl of Darlington, 1 Bro. C. R. 238, *i. e.* that where a sum of money is in the hands of one, without any other use but for himself, it will be money, and the heir cannot claim. But the cases all agree that proof of intention in such person, having the total interest, determines the question. This, therefore, is a point in which the greatest lawyers appear to have somewhat disagreed. The reader may see all the cases and principal points mentioned and referred to in Mr. Hargrave's argument in Pultney v. Darlington, 1 Bro. 226. 2 P. Wms. 174. Mr. Coxe's note. 1 vol. Bac. Abr. edit. Gwillim, 113 note. 3 Atk. edit. Saunders, 254. note.

more than they will decree a specific performance of an agreement, without *valuable* or *meritorious* consideration, or what, in the language of Lord Hardwicke, is called a consideration in the *first* or *second* degree. But, wherever a consideration of either sort has induced such assignment, whether of a contingency in lands of inheritance, or of a possibility of a chattel real, courts of Equity will interpose their authority to carry them into effect, except where such interposition would derogate from the valuable rights of creditors or purchasers. (35)

(35) See the case of Wright v. Wright, 1 Ves. 409. Beckley v. Newland, 2 P. Wms. 182. 187. Robson v. Trevor, 2 P. Wms. 191.

INDEX.

ACTION—pendency of, a badge of fraud, p. 575. et seq.
Action upon the case—extent of that remedy, 523. et seq.
Alimony—incidental power of the ecclesiastical court to decree alimony, 319. n. *(a)*
How far the jurisdiction of courts of equity in this respect extends, 320. n. *(c)*
Assets—a fraudulent attempt to alien real property will not prevent its descending as assets, 596. et seq.
Fraudulent alienation of assets by an heir, 600. et seq.
Assignee—conveyance by, to avoid responsibility for the rent, 580. n. *(i)*
Assignment—for benefit of creditors, when good, 431. note.
Assurances—operation of the statutes on assurances of record, 205. et seq.

Bargain and sale—nature of the consideration necessary to support a bargain and sale, 88. 94.
Effect of the valuable consideration in carrying the interest to persons not included under it, 109.
Bills of sale—distinction as to the operation of the statute 13 Eliz. c. 5. in cases of possession after conveyances of goods, between conditional and absolute bills of sale, 561.
Bonds—voluntary, 478. et seq.

Charitable Donations—438.
Collateral—debts arising collaterally, 456. 460.
Collusion—between an executor and purchaser, 609. n. *(h)*
Between the executor and his testator's debtor, p. 609. n. *(h)*
Common law—extent of the relief at common law, and of the relief under the statutes, 1. et seq.
Consideration—vid. tit. *valuable* and *voluntary*,—total want of consideration a conclusive argument of fraud under the statutes 13 and 27 Eliz. 73.
The consideration within these statutes distinguished from the considerations to raise uses upon the bargain and sale, covenants to stand seised, and from that which is necesssary to support an assumpsit, 76. 84.
Colorable considerations, 373.
Equitable and just considerations are not sufficient within these statutes, 406. et seq.
Considerations *ex post facto*, 495. et seq.
Construction—general rule of, 66. 32. note.

Covenant—effect of a covenant for the indemnification of the husband by trustees for the wife in a deed of separation, 344. et seq.
To stand seised to uses, 87. et seq.
Efficacy of the deed, 89. n. (*f*) 90. 91.
Tenant in tail may convey a base fee by covenant to stand seised, 106. n. (*d*)
Natural affection to a bastard no consideration to raise the use upon a covenant, 107.
Covenant—where the use shall be carried to a stranger in blood, 107. n. (*e*)
Effect of covenants to stand seised, in articles, as giving them the operation of executed settlements, 226. et n. (*a*) 29. n. (*d*)
Covin—definition of, in Plowden's Commentaries, too narrow, 585. n. (*e*)

Damages for tort—conveyance made to defeat claims of, void, 459. note.
De jure alieno—conveyances by persons entitled, 469.
Death—conveyance in expectation of, 444.
Decree—conveyance after, fraudulent, 579.
Deeds—when partially valid, 527. n.
Donatio causa mortis—not good against creditors, 442.
Dower—not barred by fraudulent conveyance, 253. note.
Equity—reluctance of the court of equity to execute agreements partially, p. 113, 114.
Importance of the consideration in the courts of equity, 116, et seq.
Of the secondary or meritorious consideration in the courts of equity, 118.
Of the dignity and weight of the valuable consideration in the courts of equity, 119.
Courts of equity will lay down no other rule than is followed at law upon the construction of these statutes of Eliz. 122.
In what cases a court of equity will impose terms upon a husband in favor of his wife in respect to his enjoyment and disposition of her trust property, 278. et seq.
Where equity will impose terms upon the husband's assignees, 291. et seq.
Why courts of equity will not relieve against marriage contracts, 373, n. (*d*)
Equitable relief in matters of fraud, 526, et seq.
Relief where the executor colludes with a purchaser in the sale of the assets, or with the testator's debtor, 609, n. (*h*)
Estopple—its nature and force, 528, n. (*b*)
Executor de son tort—when the voluntary donee is considered as such, 593, 45.

Forfeiture—fraudulent gift to defraud the king of his right by forfeiture remedied by 13 Eliz. c. 5. p. 2, 582, 3, 4.
A man shall not commit a forfeiture by covin, 590.

Fraud—on part of grantor sufficient to set aside a deed, 30, n.
The evidence of fraud within the statutes 13 and 27 Eliz. compounded of two acts, 83.
Who may take advantage of, 60, note.
Fraud in judgment of law, what is meant by it in the books, 189.
Where the fraud is inferred from the deceitfulness of the trust, and an inconsistent possession, the whole transaction is infected and vitiated, 198, 199.
The fraud intended by the statutes not absolute, but relative and constructive, 450, 1, et n. (*a*)
Antipathy to fraud characteristic of the common law, 520, et seq.
A lawful title, if infected by covin, is vicious and unavailing, 521.
Remedies against fraud at the common law, 522, et seq.
All the partialities of the law give way to its antipathy to fraud, 522.
Badges of fraud, 546, 585, 437 and note. 550 and n.
Advice of Lord Coke, 547.
Fraud is not helped by circuity, 587.
Fraud may be passive as well as active, 589.
A man shall not commit a forfeiture by collusion, 590.

Heir—covinous conveyances of the real assets by an heir, 601, et seq.
Husband and Wife—as to the husband's life interest under the limitations of a settlement, 171, 2, 3, 4. 197.
Whether the wife can, by any agreement between herself and her husband, be endued with a legal capacity as a feme sole to bind herself by her own contracts, 316. et seq. 262 note.
Power of a wife in a court of equity over her separate property, 321, 2.
How a husband may become discharged from his liability to his wife's contracts for necessaries, 337, n. (*m*)
Ground and principle of that liability, 334, et seq.

Inadequacy—of price, 169, 170, 171.
Incapacity—of the donor, how far it repels the presumption of fraud, 425, et seq.
Indemnity—the effect of an indemnity or collateral security taken by the purchaser as an abdication of the protection of the statute 27 Eliz. 167.
Infant—promise by an infant before marriage a good consideration for a settlement after marriage within the statutes, 244.
Intent to deceive—whether or not it must be particular as to the person claiming the benefit of the statute, p. 46, et seq.
Intention—of the parties cannot affect or qualify legal process so as to render that possession safe which contradicts the intention of the law, 571.

Judgment—conveyance after, carries a suspicion of fraud, 578.
Alterations as to the time of its relation, 607, n. (*e*)
Judgments by confession—489.
Jurisdiction—how far the question of fraud under these statutes belongs exclusively to a jury, 68, 73, n. (*e*)
King—title of the, defeats all collusive transactions, 584.
Rex fallere non vult, falli autem non potest, 585.
Statute 27 Eliz. c. 4. binds the king, 543, 587.

Land—property in land not evidenced by the possession of the title deeds, 550.
Lease for years—fraudulently aliened, considered as parcel of the alienor's estate at his death, 595.
Legacies—voluntary bonds will take place before, 485.
Lessee—for years, a purchaser within the statute 27 El. 376. 7.

Maleficio—debts founded in, 456.
Marriage—consideration of, 101.
Celebration.
Consideration of, greatly respected at common law, 102, n. (*a*).
Reason of its title to be ranked among valuable considerations 103, 105.
A good consideration to entitle a purchaser to the benefit of the stat. 27 El. 105, 367.
Extent of the consideration of, 110, 123. et seq.
The opinions of Lord Hale and Lord Macclesfield, 124, 125, 137.
Courts of equity will decree execution in favor of collateral limitations to near kindred in marriage articles as against the representatives of the settler, 129, et seq.
Merger—When effected or prevented by the operation of the statutes, 381, n. (*g*).
Money—voluntary gifts of money, whether they reached by the statute 13, El. 420, et seq.
Mortgagee—a purchaser within the statute 27 El. 373.
How far possession ought to follow a conditional conveyance, 555.

Natural love—no consideration, but rather an argument of fraud where the party is indebted at the time of the conveyance, 16. 452.
Its force and privilege where the party is not indebted, 452.
What relations are embraced within the scope of this privileged consideration, 453, n. (*b*)
Notice—purchaser under the statutes not affected by, 16.
Defence of this rule of construction, 39, 45. 44, n.
Where the case comes strictly within the statute, though it is disputed in a court of equity, the same construction as to the neutrality of notice prevails, 238.

Notice—Importance of notice when the purchaser is before a court of equity as the general object of its patronage, 232, 3, 4.
Constructive notice in equity, 234, n. (*c*)

Payment of debts—how far a consideration to support a conveyance, 429.
Pleading—manner of, so as to take advantage of the statutes, 596, et seq.
Possession—when a badge of fraud, 197, 548, et seq. 571 note, 572 note.
How far possession is evidence of ownership within the statutes of bankrupts, 553.
For many years will not validate fraudulent conveyances, 521, note.
Possession retained after execution, 571, et seq.
Powers of appointment—472.
of revocation, 611, et seq.
Præmia pudicitiæ—428.
Presumption—of fraud arising upon the statutes, 189, 217.
Promise—consideration to support a, 93.
Parol promises before and after marriage, 481, n. (*c*)
Purchases—in the names of third persons, p. 463, et seq.
Purchaser—where he has no notice, his case is in some respects better in equity than at law, 228, 9.
How affected by ignorance of grantor's fraudulent intent, 30, note—39 note.
How qualified to take advantage of the statute 27 El. 367, et seq.
Whether it is necessary that he who conveys fraudulently and he who sells the estate, should be the same person, 377, et seq.
Whether a trustee can be a purchaser, 389.
Conusee of a statute is a purchaser, 392.
The magnitude of the thing purchased is not respected by the statute 27 El. 393.
Registry of deeds, rules of notice relative to, 44, n.

Settlements—voluntary, 17.
Not invalidated by debts subsequently contracted except in particular cases, ibid. et seq. 396. 449, note.
Void against creditors where the settler is indebted at the time, ibid.
What sort of voluntary settlement is the most favored, 22.
Where voluntary settlements import by their inconsistency or incongruity the characters of fraud, they are void against subsequent as well as precedent debts, 27.
Partial validity of, under the statutes, 112, et seq.
Where parents or other third persons join in a settlement having an interest to part with, they may stipulate for collateral limitations, 139, et seq.
And a very slight interest will be sufficient for such purpose. 145.

Settlements—To raise this accessorial consideration of value for the collateral limitations in a settlement, there must be parties to contract, 153, et seq. 253, 260, 261.

As to the husband's life-interest under the limitations of a settlement, 171, 2, 3, 4. 197.

Ultimate limitation to the right heirs of the husband, 175, et seq.

Limitations embracing some of the objects of the marriage and extending beyond them, 180, 1, 2, 3.

Settlements after marriage generally void against purchasers and creditors, 191, et seq. 189, note.

Settlements after marriage grounded on prior agreements, 218, et seq.

Force of the recital of a prior agreement in a settlement after marriage, 236, et seq.

Parol agreement before marriage, 238. et seq.

The settlement after marriage must conform to the prior agreement, 245, et seq.

Settlements after marriage founded on fresh agreements, 249.

Settlements after marriage founded on new considerations, 253.

Supported by contracts between husband and wife, 262, et seq.

Where the wife joins in barring her jointure, 262, et seq.

Effect of the wife's joining in levying a fine, 270, et seq.

Where a wife joins in a fine to bar herself of dower, 274, et seq.

Settlements after marriage of the wife's trust-property, 278, et seq.

Settlements after marriage grounded on voluntary separation, 316, et seq.

Settlement made previous to a second, upon children by a first marriage, 348, et seq.

Clandestine and underhand agreements, 349, n. (*a*)

Statutes—13 El. c. 5. and 27 El. c. 4. of fraudulent conveyances set forth, 1 n. (*a*)

Their general spirit and purview, 10, 16, 31, 41, 187, 191, 395, 405.

Difference of construction in respect to the statutes 13 and 27 El. 187, 395, et seq.

Preventive efficacy of the statutes of fraudulent conveyances, 188.

The dispute upon the 27 Eliz. must be between two persons claiming upon legal executed conveyances, p. 235.

What description of property comes within purview of statute, 422, note.

The statute 13 Eliz. compared with the statutes of bankrupts, 491, n. (*a*) 551.

All statutes against fraud beneficially construed, 542, et n. (*a*)

How the statutes work to the benefit of the party protected, 591, et seq.

Statutes and recognizances—462, 480.
Statutes 3 & 4 *W.* & *M.* c. 14—explanation of, 603, et seq.
Stock—whether liable to creditors in courts of law or equity, 201, n. (*a*)
Surrenders—of copyholds, whether they are within the statutes, 447, n. (*b*)
Surety—whether a surety to whom a lease is made for his indemnification, is a purchaser within the statute 27 Eliz. 374, et n. (*f*)

Terms of years—husband's power of disposing of such as are held in trust for his wife, 299.
Tort—more favored in law than covin, 521.
Trust—secret trusts, 173.
Settlements after marriage of the wife's trust property, 278, et seq.
The permanent trust, and the special directory trust at common law, distinguished, 313, n. (*f*)
Resulting not within statute of frauds, 463, note.
Undue influence—how far badge of fraud, 426, note.

Uses—origin of, 84.
How raised upon the bargain and sale, 86 et seq.
How raised upon the covenant to stand seised, 87 et seq.
Difference between the cases where they are to be raised and originated, and those wherein they are only to be guided and directed, ibid.

Valuable—import of the word, 15.
Valuable consideration, nature and effect of the, 66.
Valuable consideration, how constituted, 71, 74.
Voluntary—import of the word, p. 15, 16, 65, 82.
Its flexible sense, 70, 166, notes.
Strong construction against voluntary conveyances by the early expounders of the statutes, 13.
How far the voluntariness of a conveyance is evidence of the fraudulent intent within the statutes, 61, et seq.
The 27 El. has been construed with more severity in this instance than the 13 El. 62.
To what extent this difference of construction is authorized, 395.
Voluntary deeds, how far binding upon the party and his representatives, 641, et seq.




3 6105 063 190 479

